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No. 16055 ✓

United States
Court of Appeals
for the Ninth Circuit

THE ANACONDA COMPANY, a corporation,
Appellant,

vs.

BUTTE MINERS UNION No. 1 OF THE IN-
TERNATIONAL UNION OF MINE, MILL
AND SMELTER WORKERS, et al.,
Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Montana

FILED
SEP 3 - 1958
PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court, District
of Montana, Butte Division

No. 596

BUTTE MINERS' UNION No. 1 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association; ANACONDA MILL AND SMELTERMEN'S UNION No. 117 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association; GREAT FALLS MILL AND SMELTERMEN'S UNION No. 16 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association; THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association, Plaintiffs,

vs.

THE ANACONDA COMPANY, a corporation,
Defendant.

COMPLAINT

The plaintiffs complain of the defendant, and for cause of action allege:

I.

The action arises under the Act of June 23, 1947, 61 Stat. 156, 29 U. S. C. 185, as hereinafter more fully appears;

II.

That plaintiff Butte Miners' Union No. 1 of the International Union of Mine, Mill and Smelter Workers, hereinafter referred to as Butte Miners' Union No. 1, is an unincorporated association; that plaintiff Anaconda Mill and Smeltermen's Union

No. 117 of the International Union of Mine, Mill and Smelter Workers Union, hereinafter referred to as Anaconda Mill and Smeltermen's Union No. 117 is an unincorporated association; that plaintiff Great Falls Mill and Smeltermen's Union No. 16 of the International Union of Mine, Mill and Smelter Workers, hereinafter referred to as Great Falls Mill and Smeltermen's Union No. 16, is an unincorporated association; that plaintiff International Union of Mine, Mill and Smelter Workers is an unincorporated association; that defendant Anaconda Company is a corporation incorporated in the State of Montana and qualified to do business in the State of Montana;

III.

That plaintiffs, Butte Miners' Union No. 1, Anaconda Mill and Smeltermen's Union No. 117, Great Falls Mill and Smeltermen's Union No. 16 are labor organizations maintaining their principal offices in the District of Montana; that plaintiff International Union of Mine, Mill and Smelter Workers is a labor organization maintaining its principal office in Denver, Colorado, whose duly authorized officers and agents are engaged in representing and acting for the employee members within the District of Montana. The suit is for violations of contract between the defendant Anaconda Company and employer and plaintiffs as labor organizations representing employees of the Anaconda Company and in an industry affecting commerce as defined by Chapter 7 of the National Labor Relations Act, 29 U. S. C., Section 160, et seq.

IV.

That the defendant Anaconda Company operates plants and mines at Butte, Anaconda and Great Falls, Montana; that the bargaining agent for all employees subject to the jurisdiction of the Butte Miners' Union No. 1 in the Butte operations of the defendant company is the plaintiff Butte Miners' Union No. 1 and plaintiff International Union of Mine, Mill and Smelter Workers; that the bargaining agent for all employees of the defendant company subject to the jurisdiction of the Anaconda Mill and Smeltermen's Union No. 117 at the Anaconda operations of the defendant company is the plaintiff Anaconda Mill and Smeltermen's Union No. 117 and plaintiff International Union of Mine, Mill and Smelter Workers; that the bargaining agent for all employees subject to the jurisdiction of the plaintiff Great Falls Mill and Smeltermen's Union No. 16 is the plaintiff Great Falls Mill and Smeltermen's Union No. 16 and plaintiff International Union of Mine, Mill and Smelter Workers;

V.

That negotiations between the plaintiff unions and the defendant company are carried on between the said plaintiff unions and defendant company through a Joint Negotiating Committee made up of members representing each of the said plaintiff unions, and that existing contracts between the plaintiff unions and the defendant company, and changes in individual contracts between the defendant company and the individual plaintiff unions

are and have been for a long time past, arrived at through negotiations between the defendant company and the said Joint Negotiating Committees; that there are now in existence, and have been for a long time past, contracts between the respective plaintiff unions and the defendant company covering working conditions and wages at each of said plants, said agreements being at all times material hereto in full force and effect; that all of the said contracts between the said plaintiffs and the defendant company contain provisions for the establishment of grievance committees representing employee members of the individual plaintiff unions, and prescribing the method of processing said grievances; that all of said agreements provide that if grievances can not be settled between defendant company and the individual plaintiff unions, then the subject matter of the grievances shall be submitted to arbitration; that copies of the portions of said agreements relating to grievance procedures and to arbitration are attached as Exhibits A, B and C and are by this reference made a part of this Complaint;

VI.

That there are, and at all times material to this action have been in existence, pension plan agreements between the plaintiff unions on the one hand and the defendant company on the other hand, said pension plan agreements having been negotiated by the Joint Negotiating Committee referred to above and the defendant company, and that except for the parties and for certain provisions not here material

in the contract covering the Butte operations, said pension agreements and pension plans are identical;

VII.

That under said pension agreements, eligible employee members of the plaintiff unions may retire under the terms specified in said agreements and are then entitled to draw certain pension payments as in the agreements set out; that disputes have arisen between the plaintiff unions and the defendant company on the termination of employment of member employees who are not eligible for pensions within the said agreements upon the attainment of said member employees of the age of 68 years, it being the contention of the plaintiff unions that Section 2.1(c) of each of said pension agreements has application only to employee members who are eligible for pension, said provision reading:

“2.1(c)—Notwithstanding the provisions of Subsection 2.1(a) on and after November 1, 1954, an employee’s service shall continue beyond the first day of the month following his 68th birthday only at the written request of the company.”

Section 2.1(a) of each pension agreement reads:

“2.1(a) Normal: On and after the effective date of the plan an employee may retire from the service of the employing company on his normal retirement date which shall be the first day of the month following his 65th birthday. An employee may con-

tinue to work beyond his normal retirement date, provided he is able, in the opinion of the Company, to perform the work available.

“No employee who retires for age shall become a pensioner unless he has completed fifteen or more years of continuous service to his retirement.”

That in each of the defendant company's plants, as listed above, the defendant company has adopted a policy of terminating, and is terminating, the employment of member employees upon their attainment of the age of 68 even though the said employee members are not eligible for pension; that at each of the said plants the plaintiff unions representing the employee members have listed said terminations as grievances; that at each of said plants the defendant company has denied relief on these claims through the grievance procedures; that at each of said plants the plaintiff unions have demanded arbitration of the individual disputes but that the said defendant company has refused to submit the individual grievances to arbitration and has, and still does, take the position that the provisions of the pension plan and their application are not subject to arbitration.

The plaintiffs allege that the disputes arising from the termination of employment of employees over 68 years of age are not eligible for pension are proper subjects of the grievance procedure and of arbitration, and that the defendant company is required by its agreements with the plaintiffs to submit grievances arising out of the termination of

employment of employee members not eligible for pension under said Section 2.1(c) of the pension agreements to arbitration.

Wherefore, plaintiffs demand judgment that defendant company be required to handle disputes arising out of the termination of employment of employee members not eligible for pension as grievances and to arbitrate said unsettled grievances as provided in said contracts referred to in Paragraph V above, and for their costs.

Dated this 18th day of October, 1957.

/s/ LEIF ERICKSON,
NATHAN WITT,
Attorneys for Plaintiffs.

EXHIBIT "A"

Excerpts Current Contract Between Butte Miners' Union No. 1, of the International Union of Mine, Mill and Smelter Workers and International Union of Mine, Mill and Smelter Workers and the Anaconda Company.

"16.

Grievances:

As a representative or representatives of the employees, the Company will recognize the Mine Grievance Committees in the Butte mines. The Mine Grievance Committee shall consist of not more than one employee for each working level in each operating mine and in each zone in the Kelley

Exhibit "A"—(Continued)

Mine, unless a larger number shall be mutually agreed upon between the Company and the Union. All members of such Grievance Committees shall be members of Butte Miners' Union No. 1, who shall be selected for each mine from members of said Union there employed, in such manner as the employees at each mine shall elect. In selecting members of the Mine Grievance Committees consideration should be given to their occupations so as to interfere with production as little as possible. A Committee member shall continue to serve as such only as long as he continues to be an employee of said mine. The duties of the Mine Grievance Committees shall be confined to the adjustment of disputes between the mine management and the miner or miners. The Mine Grievance Committees in the discharge of their duties shall under no circumstances go around the mine to the various working places for any cause except as permitted by their immediate supervisors. The Committee shall have the right to take up a grievance only before or after regular working hours, except as provided above, and the Company will have its representative on hand at such times.

Any grievance or misunderstanding concerning any rule, practice or working condition, including the contract system, or any other grievance which cannot be settled on the job between any employee and his immediate supervisor, must be then taken up with the Foreman or Mine Superintendent, by said employee or his representative; provided, how-

Exhibit "A"—(Continued)

ever, that no grievance shall be taken up for investigation or adjudgment where the employee or employees involved discontinue work before the procedure for adjusting grievances set forth herein has been complied with. This limitation shall not apply to employees who have been discharged or in cases where the safety of the employee is involved.

In case of disagreement as to any facts existing on the ground, not more than two members of the Committee and the employee or employees involved may accompany the Foreman or Mine Superintendent or their representatives to the working place to make any necessary examination. Such examination may be made at the start of the next working shift or as soon thereafter as practicable.

In case a settlement cannot be made, the subject matter which caused the grievance must be presented in writing by the Union within seventy-two (72) hours, excluding Saturdays, Sundays, and holidays, to the office of the Labor Commissioner of the Company. In case a settlement cannot be made in the office of the Labor Commissioner, the subject matter which caused the grievance must be taken up at the next Contact Meeting between the Company and the Union.

If the grievance is not settled as hereinbefore provided, it may within seven (7) days be referred to a committee composed of three (3) representatives from each party. If this committee cannot resolve the grievance, the committee shall write down the question to be submitted to arbitration. Within

Exhibit "A"—(Continued)

ten (10) days the parties shall attempt to agree upon an arbitrator. In the event they fail to agree upon an arbitrator, the parties agree to use the facilities of the American Arbitration Association for the selection of an arbitrator. All decisions rendered as a result of any arbitration proceedings provided for herein shall be final and binding upon both parties. Each party shall pay its own expenses in connection with said arbitration proceedings, except that expenses of the arbitrator or arbitrators shall be paid for equally by both parties.

17.

Subjects and Expenses of Arbitration:

No question of a change in the wage scale or differentials shall be the subject of arbitration. The fees and expenses of such arbitrator shall be borne equally by the Union and the Company."

EXHIBIT "B"

Excerpts Current Contract Between Anaconda Mill and Smeltermen's Union No. 117 of the International Union of Mine, Mill and Smelter Workers and International Union of Mine, Mill and Smelter Workers and the Anaconda Company.

"19.

Grievances:

Any grievance or misunderstanding concerning any rule, practice or working condition, or any other grievance which cannot be settled on the job

Exhibit "B"—(Continued)

between any employee and his employer, must be first taken up with the Management by said employee or his representative, and in case a settlement cannot be made, the subject matter which caused the grievance must be taken up with a committee representing the Union and a committee of the Company.

In case of disagreement as to any facts existing on the ground, the Union committee or its representative may, with a representative of the Company, make any necessary examinations at the working place involved.

If the grievance is not settled as hereinbefore provided, it may within seven (7) days be referred to a committee composed of three (3) representatives from each party. If this committee cannot resolve the grievance, the committee shall write down the question to be submitted to arbitration. Within ten (10) days the parties shall attempt to agree upon an arbitrator. In the event they fail to agree upon an arbitrator, the parties agree to use the facilities of the American Arbitration Association for the selection of an arbitrator. All decisions rendered as a result of any arbitration proceedings provided for herein shall be final and binding upon both parties. Each party shall pay its own expenses in connection with said arbitration proceedings, except that expenses of the arbitrator or arbitrators shall be paid for equally by both parties.

During the pendency of such grievance either party to this agreement may avail itself of the serv-

Exhibit "B"—(Continued)

ices of the conciliation or mediation channels provided by the United States Government.

It is understood and agreed that when any question or grievance arising between the Company and the Union which cannot be settled under the provisions of this agreement is submitted by the Union to a vote of its members, only those members of the Union involved in and directly affected by the issue in question and employed by the Company at the time the vote is taken, or within six (6) months prior thereto, and in good standing with the Union, shall have the right to vote thereon.

20.

Subjects and Expenses of Arbitration:

No question of a change in the wage scale or differentials shall be the subject of arbitration. The fees and expenses of such arbitrator shall be borne equally by the Union and the Company."

EXHIBIT "C"

Excerpts Current Contract Between Great Falls Mill and Smeltermen's Union No. 16 of the International Union of Mine, Mill and Smelter Workers and International Union of Mine, Mill and Smelter Workers and the Anaconda Company.

"19.

Grievances:

Any grievance or misunderstanding concerning any rule, practice or working condition, or any other grievance which cannot be settled on the job

Exhibit "C"—(Continued)

between any employee and his employer, must be first taken up with the management by said employee or his representative, and in case a settlement cannot be made, the subject matter which caused the grievance must be taken up with a committee representing the Union and a committee of the Company.

In case of disagreement as to any facts existing on the ground, the Union committee or its representative may, with a representative of the Company, make any necessary examinations at the working place involved.

If the grievance is not settled as hereinbefore provided, it may within seven (7) days be referred to a committee composed of three (3) representatives from each party. If this committee cannot resolve the grievance, the committee shall write down the question to be submitted to arbitration. Within ten (10) days the parties shall attempt to agree upon an arbitrator. In the event they fail to agree upon an arbitrator, the parties agree to use the facilities of the American Arbitration Association for the selection of an arbitrator. All decisions rendered as a result of any arbitration proceedings provided for herein shall be final and binding upon both parties. Each party shall pay its own expenses in connection with said arbitration proceedings, except that expenses of the arbitrator or arbitrators shall be paid for equally by both parties.

During the pendency of such grievance either party to this agreement may avail itself of the serv-

Exhibit "C"—(Continued)

ices of the conciliation or mediation channels provided by the United States Government.

It is understood and agreed that when any question or grievance arising between the Company and the Union which cannot be settled under the provisions of this agreement is submitted by the Union to a vote of its members, only those members of the Union involved in and directly affected by the issue in question and employed by the Company at the time the vote is taken, or within six (6) months prior thereto, and in good standing with the Union, shall have the right to vote thereon.

20.

Subjects and Expenses of Arbitration:

No question of a change in the wage scale or differentials shall be the subject of arbitration. The fees and expenses of such arbitrator shall be borne equally by the Union and the Company."

[Endorsed]: Filed October 21, 1957.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, The Anaconda Company, a corporation, and for answer to the complaint admits, denies and alleges as follows:

First Defense

The Complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

1. Admits the allegations of paragraphs numbered I, II, III, IV, V and VI.

2. Answering the allegations contained in paragraph numbered VII admits that under said pension agreements, eligible employee members of the plaintiff unions may retire under the terms specified in said agreements and are then entitled to draw certain pension payments as in the agreements set out, and in connection therewith alleges that all employee members of plaintiff unions may be retired, at the option of defendant, not later than the first day of the month following their 68th birthday and may or may not be entitled to draw pension payments; admits that disputes have arisen between plaintiff unions and the defendant company on the termination of employment of member employees who are not eligible for pensions within the said agreements upon the attaining of said member employees of the age of 68 years; admits that it is the contention of the plaintiff unions that Section 2.1 (c) of each of said pension plan agreements has application only to employee members who are eligible for pension, and in connection therewith defendant alleges that said Section 2.1 (c) of each of said pension agreements has application to all employees of defendant who are represented by plaintiffs; admits that Sections 2.1 (c) and 2.1 (a) of said pension plan agreements provide:

“2.1 (c)—Notwithstanding the provisions of Sub-

section 2.1 (a) on and after November 1, 1954, an employee's service shall continue beyond the first day of the month following his 68th birthday only at the written request of the company."

"2.1 (a) Normal: On and after the effective date of the plan an employee may retire from the service of the employing company on his normal retirement date which shall be the first day of the month following his 65th birthday. An employee may continue to work beyond his normal retirement date, provided he is able, in the opinion of the Company, to perform the work available.

"No employee who retires for age shall become a pensioner unless he has completed fifteen or more years of continuous service to his retirement."

Admits that in each of the defendant company's plants the defendant company has adopted a policy of terminating, and is terminating, the employment of member employees upon their attainment of the age of 68 even though the said employee members are not eligible for pension; that at each of the said plants the plaintiff unions representing the employee members have listed said terminations as grievances; that at each of said plants the defendant company has denied relief on these claims through the grievance procedures; that at each of said plants the plaintiff unions have demanded arbitration of the individual disputes but that the said defendant company has refused to submit the individual grievances to arbitration and has, and still does, take the position that the provisions of the

pension plan and their application are not subject to arbitration. Denies that the disputes arising from the termination of employment of employees over 68 years of age are not eligible for pension are proper subjects of the grievance procedure and of arbitration, and that the defendant company is required by its agreements with the plaintiffs to submit grievances arising out of the termination of employment of employee members not eligible for pension under said Section 2.1 (c) of the pension agreements to arbitration. Denies each and every allegation, each and every part thereof and the whole thereof contained in paragraph numbered VII. not herein specifically admitted.

3. Denies each and every allegation, each and every part thereof and the whole thereof contained in said complaint not herein specifically admitted.

Third Defense

For further and separate and affirmative defense to the complaint herein, defendant alleges:

1. That disputes exist between plaintiffs and defendant over the retirement of employees over the age of 68 years, which disputes arise out of the interpretation of the pension plan agreements and amendments thereto between the parties to this action, copies of said agreements and amendments being attached hereto as Exhibits A, B, C, D, E, F, G, H and I, and by this reference made a part hereof.

2. That said disputes are not subject to or covered by the provisions of the collective bargaining

agreements between the parties to this action with regard to working conditions and wages, copies of said agreements being attached hereto as Exhibits J, K and L, and by this reference made a part hereof.

3. That said pension plan agreements and amendments are distinct and separate documents which are not to be considered part of, collateral or supplemental to said collective bargaining agreements, or any other collective bargaining agreements, and the application, interpretation and operation of said pension plan agreements are expressly not subject to the provisions of said collective bargaining agreements; that Section 9, as amended, of each pension plan agreement entitled "Independence of Plan and Pension Plan Agreement," reads as follows:

"Section 9. Independence of Plan and Pension Plan Agreement.

"Notwithstanding anything to the contrary herein or elsewhere contained or implied, the Plan and this Agreement together constitute the Pension Plan provided for in Section V of the Supplementary Agreement between the parties dated November 13, 1951, and the entire agreement and understanding of the parties with respect to such Section V. This Agreement is a distinct and separate document, which, it is agreed, is not to be and shall not be construed to be a part of, or collateral or supplemental to any collective bargaining agreement between the Company and the Union."

4. That Sections 2.1 (a) and 2.1 (c) of said pension plan agreements apply to and cover all employees of defendant, as defined in Section 1.8 of said pension plan agreements, who reach their 68th birthday regardless of whether or not said employees fulfill other requirements or are entitled to pension benefits under said agreements; that Section 1.8 provides as follows in each pension plan agreement:

“1.8 ‘Employee’ means any person who is regularly employed by an Employing Company and who is in a bargaining unit for which a Pension Agreement was executed, or is a member of a group of persons to whom the benefits of this Plan have been made available by designation by the Employing Company; but the term does not include any person engaged on a temporary, casual or part-time basis. The term shall include, upon his return, any person formerly on the payroll, who on the effective date of the Plan was not actively at work because of illness or disability, provided he reports for work promptly upon his recovery and does not take other than casual employment in the intervening period.”

5. That the disputes alleged in the complaint are not subject to arbitration under either said pension plan agreements or said collective bargaining agreements.

Wherefore, the defendant denies that plaintiffs are entitled to the relief asked and prays that plain-

tiffs' action be dismissed and that defendant may have and recover its costs and disbursements herein.

Dated this 8th day of November, 1957.

/s/ J. T. FINLEY,
/s/ W. M. KIRKPATRICK,
/s/ P. L. MacDONALD,
/s/ SAM STEPHENSON, JR.,
/s/ JOSEPH B. WOODLIEF,
Attorneys for Defendant.

[Endorsed]: Filed November 8, 1957.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

The defendant, The Anaconda Company, a corporation, moves the Court to enter, pursuant to the provisions of Rule 56 (b) and (c) of the Federal Rules of Civil Procedure, a summary judgment for the defendant dismissing the action on the ground that the pleadings and admissions on file show that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law.

Dated this 24th day of December, 1957.

/s/ J. T. FINLEY,
/s/ W. M. KIRKPATRICK,
/s/ P. L. MacDONALD,
/s/ SAM STEPHENSON, JR.,
/s/ JOSEPH B. WOODLIEF,
Attorneys for Defendant.

[Endorsed]: Filed December 24, 1957.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

The plaintiffs, Butte Miners' Union No. 1 of the International Union of Mine, Mill and Smelter Workers, an unincorporated association, Anaconda Mill and Smeltermen's Union No. 117 of the International Union of Mine, Mill and Smelter Workers, an unincorporated association, Great Falls Mill and Smeltermen's Union No. 16 of the International Union of Mine, Mill and Smelter Workers, an unincorporated association, and the International Union of Mine, Mill and Smelter Workers, an unincorporated association, move the Court to enter, pursuant to the provisions of Rule 56(b) and (c) of the Federal Rules of Civil Procedure, a Summary Judgment for the plaintiffs, dismissing the action on the ground that the pleadings and admissions on file and the Affidavits show that there is no genuine issue as to any material fact and that the plaintiffs are entitled to a judgment as a matter of law.

Dated this 4th day of January, 1958.

NATHAN WITT,
/s/ LEIF ERICKSON,
Attorneys for Plaintiffs.

[Title of District Court and Cause.]

AFFIDAVIT

State of Montana,

County of Silver Bow—ss.

Comes Now Ernest Salvas, who being first duly sworn deposes and says:

That he is and was at all times material hereto the International Representative of the International Union of Mine, Mill and Smelter Workers, and as such, is familiar with the negotiations of contracts and agreements between the plaintiffs and the defendant; that he participated in the negotiation of the current Collective Bargaining Agreement between the plaintiffs and the defendant and in the negotiation of the Pension Agreements and Plans referred to in the pleadings; that prior to January 1, 1955, there was in effect no policy or program of the defendant to retire employees not eligible for pension by reason of their attaining the age of 68 years; that such policy was not adopted and applied until on or about January 1, 1955.

/s/ ERNEST SALVAS.

Subscribed and sworn to before me this 4th day of January, 1958.

[Seal] /s/ LEIF ERICKSON,

Notary Public for the State of Montana, Residing
at Helena, Montana. My Commission expires:
Sept. 24, 1959.

[Endorsed]: Filed January 6, 1958.

[Title of District Court and Cause.]

MEMORANDUM

This is an action brought by the plaintiffs under the provisions of Section 301 of the Labor-Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C.A., Sec. 185, for specific performance of the arbitration provisions of collective bargaining agreements in an industry affecting commerce. Plaintiffs are the bargaining agents for the miners and mill and smelter workers employed by defendant in its mines at Butte, Montana, and in its smelters at Anaconda and Great Falls, Montana.

Butte Miners' Union No. 1, Anaconda Mill and Smeltermen's Union No. 117 and Great Falls Mill and Smeltermen's Union No. 16, are each affiliated with the International Union of Mine, Mill and Smelter Workers. Each of the three local unions entered into a separate contract with defendant covering "rates of wages, hours of labor, and other conditions of employment" covering miners employed by defendant in its Butte mines and smelter men employed by defendant in its Anaconda and Great Falls smelters respectively. The International Union is also a party to each agreement. The three agreements, which will be hereinafter referred to as the collective bargaining agreements, differ in some respect, but the provisions of each agreement that are relevant and material to this case are identical. Each of the collective bargaining agreements is dated July 1, 1956, and they are effective from July 1, 1956, to June 30, 1959.

[Title of District Court and Cause.]

AFFIDAVIT

State of Montana,
County of Silver Bow—ss.

Comes Now Ernest Salvas, who being first duly sworn deposes and says:

That he is and was at all times material hereto the International Representative of the International Union of Mine, Mill and Smelter Workers, and as such, is familiar with the negotiations of contracts and agreements between the plaintiffs and the defendant; that he participated in the negotiation of the current Collective Bargaining Agreement between the plaintiffs and the defendant and in the negotiation of the Pension Agreements and Plans referred to in the pleadings; that prior to January 1, 1955, there was in effect no policy or program of the defendant to retire employees not eligible for pension by reason of their attaining the age of 68 years; that such policy was not adopted and applied until on or about January 1, 1955.

/s/ ERNEST SALVAS.

Subscribed and sworn to before me this 4th day of January, 1958.

[Seal] /s/ LEIF ERICKSON,
Notary Public for the State of Montana, Residing
at Helena, Montana. My Commission expires:
Sept. 24, 1959.

[Endorsed]: Filed January 6, 1958.

[Title of District Court and Cause.]

MEMORANDUM

This is an action brought by the plaintiffs under the provisions of Section 301 of the Labor-Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C.A., Sec. 185, for specific performance of the arbitration provisions of collective bargaining agreements in an industry affecting commerce. Plaintiffs are the bargaining agents for the miners and mill and smelter workers employed by defendant in its mines at Butte, Montana, and in its smelters at Anaconda and Great Falls, Montana.

Butte Miners' Union No. 1, Anaconda Mill and Smeltermen's Union No. 117 and Great Falls Mill and Smeltermen's Union No. 16, are each affiliated with the International Union of Mine, Mill and Smelter Workers. Each of the three local unions entered into a separate contract with defendant covering "rates of wages, hours of labor, and other conditions of employment" covering miners employed by defendant in its Butte mines and smelter men employed by defendant in its Anaconda and Great Falls smelters respectively. The International Union is also a party to each agreement. The three agreements, which will be hereinafter referred to as the collective bargaining agreements, differ in some respect, but the provisions of each agreement that are relevant and material to this case are identical. Each of the collective bargaining agreements is dated July 1, 1956, and they are effective from July 1, 1956, to June 30, 1959.

Lincoln Mills, *supra*, at page 456, the Court said:

"It seems, therefore, clear to us that Congress adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes, by implication rejecting the common-law rule, discussed in *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, against enforcement of executory agreements to arbitrate. We would undercut the Act and defeat its policy if we read Sec. 301 narrowly as only conferring jurisdiction over labor organizations.

"The question then is, what is the substantive law to be applied in suits under Sec. 301(a)? We conclude that the substantive law to apply in suits under Sec. 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. * * *"

The Section 301(a) referred to in this quotation is Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C.A. 185, under which the present suit is brought.

Defendant in its brief and oral argument contends that the law of the State of New York is controlling in this case because by a specific provision of the pension agreements New York law is made applicable and controlling in the interpretation of those agreements. However, it is the collective bargaining agreements which must be construed to determine the narrow issue presented in this case, and not the pension agreements. The Court is not here concerned with whether the terminations of

employment in dispute were justified by the provisions of the pension agreements. If an arbitrable issue is found to exist under the collective bargaining agreements, the arbitrator will apply New York law in determining whether the terminations of employments complained of were or were not justified by the provisions of the pension agreements. In construing the collective bargaining agreements with reference to whether an arbitrable dispute exists between plaintiffs and defendant here, the Court, in accordance with *Textile Workers v. Lincoln Mills*, supra, must apply federal law, of which there seems to be a considerable body already fashioned, and this Court is not faced with the necessity of fashioning any law in this case.

In *Local 205, etc. v. General Electric Co.*, 233 F. (2d) 85, affirmed, 353 U. S. 547, the Court of Appeals for the First Circuit said:

“The scope of an arbitration pledge is solely for the parties to set, and thus the determination of whether a particular dispute is arbitrable is a problem of contract interpretation.”

We turn then to the provisions of the collective bargaining agreements with reference to disputes, grievances and arbitration to determine the scope of the arbitration pledge. Except for slight differences in wording between the three agreements, which are not material here, those provisions are:

“Walkouts, Lockouts,

Protection of Property:

“During the life of this agreement the Union

agrees that there shall be no collective cessation of work by the members of the Union on account of any controversy with the Company respecting the provisions of this agreement, or any other controversy that may arise between the parties to this agreement, until and unless all of the means of settling any such controversy under the provisions of this agreement, or otherwise, shall have failed. The Company agrees that it will not lock out the employees covered by this agreement on account of any controversy with the employees respecting the provisions of this agreement, or any other controversy that may arise between the parties to this agreement, until and unless all other means of settling such controversy under the provisions of this agreement, or otherwise, shall have failed; * * *."

"Grievances:

"Any grievance or misunderstanding concerning any rule, practice or working condition, or any other grievance which cannot be settled on the job between any employee and his employer, must be first taken up with the Management by said employee or his representative, and in case a settlement cannot be made, the subject matter which caused the grievance must be taken up with a committee representing the Union and a committee of the Company. * * *"

Then follows various steps to be taken looking toward a settlement of the grievance, the final step of which is arbitration.

“Subjects and Expenses
of Arbitration:

“No question of a change in the wage scale or differentials shall be the subject of arbitration. The fees and expenses of such arbitrator shall be borne equally by the Union and the Company.”

Bearing in mind the admonition of Judge Follmer in *Insurance Agents International Union v. Prudential Ins. Co.*, 122 Fed. Supp., 869, 872, that “arbitration is here to stay, and particularly where the parties have elected to submit their differences to it, the courts should not by hair splitting decisions hamstring its operations”, we proceed to analyze these provisions of the collective bargaining agreements.

Broader arbitration provisions than those contained in the collective bargaining agreements between plaintiffs and defendant are difficult to imagine. In the preamble to the agreements, it is recited that they are intended to cover rates of wages, hours of labor and other conditions of employment of all men subject to the jurisdiction of the Unions, employed by the Company. Certainly age is a condition of employment. Then the parties mutually agree that there will be no strike or lockout on account of any controversy respecting the provisions of the agreement, or any other controversy that may arise between the parties until and unless all the means of settling the controversy under the provisions of the agreement, or otherwise, shall have failed. Then, in the machinery set up in the agreements for the handling of disputes

under the heading "Grievances" the parties agreed that any grievance or misunderstanding concerning any rule, practice or working condition, or any other grievance which could not be settled on the job, would be taken up in the manner therein provided, the final step of which is arbitration.

Finally, the parties, no doubt realizing that they had used extremely broad language in defining the controversies which were to be the subject of the grievance procedure they set up, themselves excluded the things from arbitration which they desired to exclude when *the* provided "No question of a change in the wage scale or differentials shall be the subject of arbitration."

Argument has been made that the dispute here involved between plaintiffs and defendant is not covered by and embraced within the meaning of the term "grievances", used in the contract. However, this Court agrees with the Court in *Timken Roller Bearing Co. v. National Labor Relations Board*, 161 F. (2d) 949, 955, that the term "grievances" as used in a collective bargaining agreement is not a word of art and has not connotation differing from its meaning in ordinary use. The dispute in this case is certainly a "grievance" as that term is interpreted and discussed in *Douds v. Local 1250*, etc., 173 F. (2d) 764, 771. Furthermore, in this case, as in the *Timken Roller Bearing* case, *supra*, the contracts contain broader language, "or any other controversy that may arise between the parties".

In view of the broad terms used in the agree-

ments, "any other controversy that may arise between the parties", "any other grievance which cannot be settled on the job", and in view further of the fact that the parties by express provision, excluded from arbitration those matters which they did not desire to arbitrate, the Court is of the opinion that the dispute between the plaintiffs and the defendant is an arbitrable dispute within the meaning of the collective bargaining agreements. The following statement in the case of *Signal-Stat Corporation v. Local 475, etc.*, 235 F. (2d) 298 at 301, sums up precisely the Court's opinion in this case:

"We think the broad arbitration clause in the collective bargaining agreement here involved covers a dispute relating to an alleged breach of the no-strike clause. Under the agreement, 'All disputes, grievances or differences' are arbitrable. We can hardly imagine more broadly inclusive language. This phraseology distinguishes the instant case from *Market Electric Products, Inc., v. United Electric, Radio & Machine Workers*, *supra*. To the extent that the other cases cited by plaintiff require a contrary result, we think them erroneous. We think their interpretations of similar arbitration clauses are unduly restrictive and achieve, by indirection, the same result as the old, and now generally rejected, judicial aversion to enforcing arbitration agreements."

Cases like *U. S. Steel Corp. v. Nichols*, 229 F. (2d) 396 and *United Protective Workers v. Ford Motor Co.*, 194 F. (2d) 997, are different from the

case at bar. In those cases the discharged employees were suing the employers for damages for their discharge which the employer claimed was by virtue of a policy of compulsory retirement plan. In those cases the Courts were called upon to decide the very issue which the arbitrators will be called upon to decide in this case.

Defendant argues that under the express provisions of the pension agreements, only certain controversies that may arise between the parties are arbitrable, and that the present controversy is not one of them. However, as pointed out, the arbitration is not sought under the pension agreements, but under the collective bargaining agreements. It may be that when the controversy comes before the arbitrators, they may find that the pension agreements furnish justification for the terminations of employment complained of, but that is for the arbitrators to decide.

Defendant also seeks some support for its position in the provision of the pension agreements to the effect that such agreements are separate and distinct documents and are not to be construed as a part of or collateral or supplemental to any collective bargaining agreement. This provision of the pension agreements, however, seems to the Court to weaken the position of the defendant, for if the pension agreements could be considered as amending or supplementing the collective bargaining agreements, then they might be considered, as the company urges, in determining whether the present controversy presents an arbitrable issue under the

collective bargaining agreements. Being by their express provisions not amendatory of or supplemental to the collective bargaining agreements, the pension agreements cannot be considered in deciding the issues of arbitrability under the collective bargaining agreements. There is likewise a provision in each of the collective bargaining agreements that "This contract is exclusive for its entire term and not subject to further negotiation and is to cover all contract relations between the parties for its entire term", which prevents any recourse to the pension agreements in determining the question of arbitrability presented here.

There is this additional circumstance which impels the Court to the conclusion it has reached. The pension agreements were all in existence at the time the last collective bargaining agreements with the broad, all inclusive provisions for disposing of controversies and grievances previously pointed out were executed. At that time, had the parties intended to exclude such a controversy as the instant one from the grievance procedures they set up on the ground that it was covered by the pension agreements, as defendant now maintains, it would have been a simple matter to so state in the collective bargaining agreements as they did with respect to questions concerning wage scales and differentials.

It is also urged by defendant that no bona fide dispute exists because the pension plan by its terms requires the termination of employment of employees 68 years of age or older, even though they are

not entitled to a pension. While a frivolous or patently baseless claim should not be ordered to arbitration, *Local 205, etc., v. General Electric*, 235 F. (2d) 85, the controversy here is not of that type. Indeed, defendant admits that a dispute exists but in effect argues that because it has a defense in the pension agreements to the claim of plaintiffs that it is not a bona fide dispute. The fact that a defense may exist to a claim does not make the claim frivolous or baseless, and the validity of the defense should be decided by the tribunal to which the parties have agreed to submit their disputes—in this case, the arbitrators—and the Court should not usurp that function under the guise of determining whether there is an arbitrable issue.

Finally, it has been suggested by defendant that summary judgment may not be granted to plaintiff in an action seeking specific performance. This rule has its foundation in the fact that summary judgment is granted only when a party is entitled to judgment as a matter of law, whereas, specific performance generally is a remedy equitable in nature to which no one is entitled as a matter of right or of law, but only as he is able to move the conscience of the equity court. Whatever validity such argument may once have had has been destroyed in actions brought under the Labor Management relations act by the Supreme Court's decision in *Textile Workers v. Lincoln Mills*, *supra*, and *General Electric v. Local 205, etc.*, *supra*, where the Supreme Court held that Section 301(a)

of the Labor Management Relations Act furnishes a body of federal substantive law for the enforcement of collective bargaining agreements. It is interesting to note that perhaps the leading decision in this type case, and one cited with approval by the Supreme Court in *Textile Workers v. Lincoln Mills*, *supra*,—Judge Wyzanski's decision in *Textile Workers Union v. American Thread Co.*, 113 Fed. Suppl. 137—was decided on motion for summary judgment.

Plaintiffs are ordered to prepare a decree in accordance with the opinion expressed in this memorandum, submit it to counsel for defendant for approval as to form, and present it to the Court for signing within 15 days from the date of receipt of this memorandum.

Dated this 3rd day of March, 1958.

/s/ W. D. MURRAY,
United States District Judge.

[Endorsed]: Filed March 3, 1958.

United States District Court, District
of Montana, Butte Division

Civil Action No. 596

BUTTE MINERS' UNION NO. 1 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association; ANACONDA MILL AND SMELTERMEN'S UNION NO. 117 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association; GREAT FALLS MILL AND SMELTERMEN'S UNION NO. 16 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association; THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association,

Plaintiffs,

vs.

THE ANACONDA COMPANY, a corporation,
Defendant.

JUDGMENT

This cause came on regularly for hearing on the Motions by each of the parties for Summary Judgment on the 6th day of January, 1958, the plaintiffs were represented by their counsel Leif Erickson, Esq., and Nathan Witt, Esq., and the defendant was represented by J. T. Finlen, Esq., W. M. Kirkpatrick, Esq., J. L. MacDonald, Esq., Sam

Stephenson, Jr., Esq., and Joseph B. Woodlief, Esq., and briefs having been submitted and the parties having presented arguments, and the Motions being then submitted to the Court for its consideration and decision, thereafter the Court on the 3rd day of March, 1958, issued its Memorandum and ordered that judgment be entered for the plaintiffs.

Now, Therefore, pursuant to said Order, it is Ordered, Adjudged and Decreed and this does Order, Adjudge and Decree that defendant submit to arbitration in accordance with the grievance and arbitration provisions of the current collective bargaining agreements between the plaintiffs and defendant, the disputes which have arisen between the parties with regard to the termination of employment by defendant of employees represented by plaintiff unions who have reached the age of 68 years and who are not entitled to pension payments under the current pension plan agreements between plaintiffs and defendant, and it is further Adjudged that plaintiffs recover of the defendant costs of this action taxed in the sum of \$17.00.

Dated this 31st day of March, 1958.

/s/ W. D. MURRAY,
United States District Judge.

[Endorsed]: Filed and Entered March 31, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Butte Miners' Union No. 1 of The International Union of Mine, Mill and Smelter Workers, an unincorporated association; Anaconda Mill and Smeltermen's Union No. 117 of The International Union of Mine, Mill and Smelter Workers, an unincorporated association; Great Falls Mill and Smeltermen's Union No. 16 of The International Union of Mine, Mill and Smelter Workers, an unincorporated association; The International Union of Mine, Mill and Smelter Workers, an unincorporated association; and to Leif Erickson, 347 North Last Chance Gulch, Helena, Montana, and Nathan Witt, P. O. Box 156, New York 23, New York, their attorneys:

Notice is hereby given that The Anaconda Company, a corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 31st day of March, 1958.

Dated this 25th day of April, 1958.

/s/ W. M. KIRKPATRICK,
/s/ P. L. MacDONALD,
/s/ SAM STEPHENSON, JR.,
/s/ JOSEPH B. WOODLIEF,
/s/ R. L. BROWN, JR.,
/s/ W. J. KELLY,

Attorneys for Defendant.

[Endorsed]: Filed April 25, 1958.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE TRANSCRIPT OF RECORD

The motion of appellant to extend the time within which to file the transcript of record on appeal is hereby granted, and it is

Ordered that the time within which to file the transcript of record on appeal in the above-entitled cause be, and the same is hereby, extended to and including the 24th day of June, 1958.

Dated this 28th day of May, 1958.

/s/ W. D. MURRAY,
United States District Judge.

[Endorsed]: Filed and Entered May 28, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Dean O. Wood, Clerk of the District Court of the United States in and for the District of Montana, do hereby certify to the Honorable, the United States Court of Appeals for the Ninth Circuit, that the foregoing volume consists of the original papers, viz: Judgment Roll, consisting of Complaint, Answer, Motion of Plaintiff for Summary Judgment, Motion of Defendant for Summary Judgment, Memorandum of Judge W. D. Murray, and Judgment; also Notice of Appeal, Designation of Contents of Record on Appeal, and Statements of Points on Appeal, together with the Names and

Addresses of Attorneys, the Petition and Order Extending Time to File Transcript of Record, and Certificate of Clerk, the same being all matters designated by the parties and required by the rule as the Record on Appeal in Case No. 596, Butte Miners' Union No. 1, etc., et al., vs. The Anaconda Company, a corporation.

I certify that the costs of said Transcript amount to the sum of Five and No/100 (\$5.00) Dollars, and have been paid by the Appellant.

Witness my hand and the seal of said District Court at Butte, Montana, this 12th day of June A.D., 1958.

[Seal]

DEAN O. WOOD,

Clerk,

/s/ By D. F. HOLLAND,

Deputy Clerk.

[Endorsed]: No. 16055. United States Court of Appeals for the Ninth Circuit. The Anaconda Company, a corporation, Appellant, vs. Butte Miners Union No. 1 of the International Union of Mine, Mill and Smelter Workers, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed: June 14, 1958

Docketed: June 20, 1958

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16055

THE ANACONDA COMPANY, a corporation,
Appellant,
vs.

BUTTE MINERS' UNION No. 1 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association; ANACONDA MILL AND SMELTERMEN'S UNION No. 117 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association; GREAT FALLS MILL AND SMELTERMEN'S UNION No. 16 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association; THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association,
Appellees.

STATEMENT OF POINTS ON APPEAL

Appellant, The Anaconda Company, a corporation, specifies the following points upon which it intends to rely in the appeal in the above-entitled matter:

That the Court erred in entering judgment for the appellees upon appellees' Motion for Summary Judgment for the reason that the pleadings herein show that the appellant is entitled to a judgment upon appellant's Motion for Summary Judgment as a matter of law.

Dated this 17th day of June, 1958.

/s/ W. M. KIRKPATRICK,
/s/ P. L. MacDONALD,
/s/ SAM STEPHENSON, JR.,
/s/ JOSEPH B. WOODLIEF,
/s/ R. LEWIS BROWN, JR.,
/s/ WILLIAM J. KELLY,

Attorneys for Appellant, The
Anaconda Company.

[Endorsed]: Filed June 20, 1958. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellant, The Anaconda Company, a corporation, appellant above named, hereby designates the contents of the record on appeal as the following original documents from the record in the above-entitled matter:

1. Complaint.
2. Answer.
3. Motion for Summary Judgment of Plaintiffs.
4. Motion for Summary Judgment of Defendant.
5. Memorandum of Judge W. D. Murray.
6. Judgment.
7. Notice of Appeal.
8. Designation of Contents of Record on Appeal.
9. Statement of Points on Appeal.

10. Order Extending Time to File Transcript of Record.

Dated this 17th day of June, 1958.

/s/ W. M. KIRKPATRICK,
/s/ P. L. MacDONALD,
/s/ SAM STEPHENSON, JR.,
/s/ JOSEPH B. WOODLIEF,
/s/ R. LEWIS BROWN, JR.,
/s/ WILLIAM J. KELLY,

Attorneys for Appellant, The
Anaconda Company.

[Endorsed]: Filed June 20, 1958. Paul P.
O'Brien, Clerk.

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ANACONDA COMPANY, a corporation,
Appellant,

-VS.-

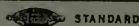
BUTTE MINERS UNION NO. 1 OF THE
INTERNATIONAL UNION OF MINE,
MILL AND SMELTER WORKERS, et al.,
Appellees.

BRIEF OF APPELLANT

W. M. KIRKPATRICK,
P. L. MacDONALD,
SAM STEPHENSON, JR.,
JOSEPH B. WOODLIEF,
R. LEWIS BROWN, JR.,
WILLIAM J. KELLY,

Hennessy Building,
Butte, Montana,

Attorneys for Appellant.



FILED

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No. 16055

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ANACONDA COMPANY, a corporation,
Appellant,

-vs.-

BUTTE MINERS UNION NO. 1 OF THE
INTERNATIONAL UNION OF MINE,
MILL AND SMELTER WORKERS, et al.,
Appellees.

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This is an action brought by the plaintiffs-appellees to compel specific performance of arbitration provisions contained in certain collective bargaining agreements between the parties (R. 8-9). Suit was filed under the provisions of Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 USCA, Section 185 (R. 4), and defendant-appellant admitted in its answer that the District Court had jurisdiction under said Act (R. 17); that defendant-appellant was engaged in an

industry affecting commerce (R. 4, 17), and that plaintiffs-appellees are labor organizations as defined in said Act (R. 4, 17). Both parties filed a motion for summary judgment (R. 22-23), and this appeal is from a final judgment granting plaintiffs-appellees' motion for a summary judgment based upon the pleadings and admissions filed in this case (R. 38-39).

STATEMENT OF CASE

Defendant-appellant is hereinafter called the "defendant" and plaintiffs-appellees are hereinafter called the "plaintiffs."

Volume I of the Record is referred to as "Record," and Volume II of the Record is referred to as "Supplemental Record."

The defendant is a Montana corporation and is engaged in the mining business in Butte, Montana, and the smelting business at Great Falls and Anaconda, Montana (R. 5, 17). The plaintiffs are unincorporated labor organizations and represent the employees of the defendant at the three above-named operations for the purpose of collective bargaining (R. 5, 17). The defendant and the plaintiffs have negotiated and entered into collective bargaining agreements over a period of many years (R. 5, 6, 17). Among the provisions of these agreements there is one providing for the settlement of grievances:

"WALKOUTS, LOCKOUTS, PROTECTION OF PROPERTY:

"During the life of this agreement the Union agrees that there shall be no collective cessation

of work by the members of the Union on account of any controversy with the Company respecting the provisions of this agreement, or any other controversy that may arise between the parties to this agreement, until and unless all of the means of settling any such controversy under the provisions of this agreement, or otherwise, shall have failed. The Company agrees that it will not lock out the employees covered by this agreement on account of any controversy with the employees respecting the provisions of this agreement, or any other controversy that may arise between the parties to this agreement, until and unless all other means of settling such controversy under the provisions of this agreement, or otherwise, shall have failed; * * *

* * * * *

“GRIEVANCES:

“Any grievance or misunderstanding concerning any rule, practice or working condition, or any other grievance which cannot be settled on the job between any employee and his employer, must be first taken up with the Management by said employee or his representative, and in case a settlement cannot be made, the subject matter which caused the grievance must be taken up with a committee representing the Union and a committee of the Company. * * *”
(R. 29-30.)

After providing for the various steps through which a grievance shall be processed, the agreements provide that the grievance shall be submitted to arbitration.

The so-called grievance clauses in all the agreements are identical insofar as they are material here, and have remained the same during the period with which we are concerned (R. 5, 6, 9-16, 17).

The most recent collective bargaining agreements were effective July 1, 1956, and are to remain in effect until June 30, 1959 (Sup. R. Def. Exhibits "J", p. 1; "K", p. 1; "L", p. 1).

Another provision of the collective bargaining agreements that is material here is as follows:

**"SUBJECTS AND EXPENSES OF
ARBITRATION:**

"No question of a change in the wage scale or differentials shall be the subject of arbitration. The fees and expenses of such arbitrator shall be borne equally by the Union and the Company." (R. 31.)

On November 13, 1951, the parties entered into settlement agreements providing for amendments to the collective bargaining agreements and in addition providing that they would negotiate a pension plan for employees at each operation (Sup. R. Def. Exhibits "A", p. 3; "D", p. 3; "G", p. 3).

On March 14, 1952, agreements were entered into which established the pension plan. These agreements were to remain in effect until June 30, 1956. For the purposes of this litigation the provisions of these pension agreements and plans are identical (Sup. R. Def. Exhibits "A", "D", "G", also R. 26).

Section 9 of the 1952 pension agreements (R. 20 and Sup. R. Def. Exhibits "A", p. 3; "D", p. 3; "G", p. 3) reads as follows:

"Section 9. Independence of Plan and Pension Plan Agreement

"Notwithstanding anything to the contrary herein or elsewhere contained or implied, the Plan and this Agreement together constitute

the Pension Plan provided for in Section V of the Supplementary Agreement between the parties dated November 13, 1951, and the entire agreement and understanding of the parties with respect to such Section V. This Agreement shall not be construed to be a part of, or collateral or supplemental to, the Collective Bargaining Agreement dated April 10, 1950, as amended by the Supplementary Agreement dated November 13, 1951, between the Company and the Union.”

In the pension plans themselves we find (Sup. R. Def. Exhibits “A”, pp. 14-15; “D”, pp. 14-15; “G”, pp. 14-15) the following provisions:

“Section 4

“Administration

“4.1 Operation and Administration of the Plan:

“The Company shall solely be responsible for and solely have control of the operation and administration of the Plan, and shall adopt such rules and regulations as may be necessary for the efficient operation and administration of the Plan.

“4.2 Joint Administrative Procedure Board:

“A Joint Administrative Procedure Board shall be established by the Employing Company and each Union that has entered into a Pension Agreement with such Company. Each such Board shall consist of not more than six members, one-half of whom shall be designated by the Employing Company and one-half of whom shall be designated by the Union. The representatives of the Employing Company and the Union shall each collectively have one vote. If any difference should arise between any Employing Company and any Employee or Pensioner as to a question of fact as set forth in Section 5, such question shall be referred by the

Employing Company to the appropriate Joint Administrative Procedure Board. Each Joint Administrative Procedure Board, in its discretion, may establish standardized procedures and appoint such sub-committees as it deems necessary for the efficient processing of such questions. Each such Board shall be furnished at the end of each calendar year with a report from the Company regarding the operation of the Pension Plan by the Company in so far as it affects the Employees in the bargaining unit represented by the Union concerned.

“Section 5

“Appeals Procedure

“5.1 As to Age, Years of Continuous Service or Average Monthly Earnings:

“The Employing Company shall refer to the appropriate Joint Administrative Procedure Board any difference which it may have with an Employee or Pensioner as to: (a) the number of years of continuous service of such Employee or (b) the age of such Employee or (c) the average monthly earnings used for pension calculations under Section 3. If the Joint Administrative Procedure Board cannot reach a decision or if the Employee or Pensioner is not represented by a Joint Administrative Procedure Board the question shall be submitted for arbitration to the American Arbitration Association. The American Arbitration Association shall have authority only to decide the question pursuant to the provisions of the Plan, but shall not have authority in any way to alter, add to or subtract from any of such provisions. The decision of the American Arbitration Association on any such question shall be binding on the Company, the Employing Company, the Joint Administrative Procedure Board, the Employee and his duly authorized representative.

“5.2 As to Cause, Existence or Continuance of Permanent and Total Disability:

“The Employing Company shall refer to a Medical Board any question as to whether Employee, if he shall have been determined to be permanently and totally disabled, but shall not have reached his normal retirement date, became permanently and totally disabled through some unavoidable cause, or whether such Employee is permanently and totally disabled or whether such Pensioner continues to be permanently and totally disabled. Such difference shall be resolved by the Medical Board which shall consist of three physicians, one appointed by the Employing Company, one appointed by the Union representing such Employee or by the Employee, if he is not represented by a Union, and the third selected by such two physicians. The fees and expenses of the physicians shall be borne by the party appointing such physician and the fees and expenses of the third physician shall be shared equally by such parties. The opinion of a majority of such Medical Board shall be final and binding upon the Company, the Employing Company, the Joint Administrative Procedure Board, the Employee and his duly authorized representative.”

On October 15, 1954, the parties agreed to amend the pension agreements and plans (Sup. R. Def. Exhibits “B”, p. 1; “E”, p. 1; “H”, p. 1). The last sentence of Section 9 was amended to read as follows:

“This Agreement is a distinct and separate document, which, it is agreed, is not to be and shall not be construed to be a part of, or collateral or supplemental to, *any collective bargaining agreement.*” (Emphasis added.)

Sections 4, 5 and 6 of the plans remain unchanged.

These agreements and plans as amended were to terminate on December 31, 1957 (Sup. R. Def. Exhibits "B", p. 1; "E", p. 1; "H", p. 1).

Shortly after the October 15, 1954, amendments to the pension plans, the defendant adopted a policy of retiring employees at the age of 68 in accordance with the provisions of Section 2.1(c) of the plan (R. 18). Some of these employees did not have the required number of years of service to entitle them to pension payments under the plan. The plaintiffs objected to the retirement of these employees and presented grievances concerning them in accordance with the grievance procedure set forth in the collective bargaining agreements. The plaintiffs took the position that the defendant could not retire an employee at the age of 68 unless he had sufficient years of service to entitle him to a pension. The defendant refused to accept these grievances and to process them through the arbitration procedure provided for in the collective bargaining agreements (R. 18).

On June 29, 1956, the Butte and Anaconda pension plans and agreements were again amended and provide for termination on June 30, 1960, and similar amendments were made July 7, 1956, in the Great Falls pension plan and agreement (Sup. R. Def. Exhibits "C", "F", "I"). None of the other amendments are material to this case. At the same times the collective bargaining agreements presently in effect were entered into (Sup. R. Def. Exhibits "J", "K", "L").

On October 22, 1957, the plaintiffs filed suit against the defendant in the United States District Court requesting that the Court issue an order to compel the defendant to arbitrate the question of the right to retire employees at the age of 68 who did not qualify for pensions (R. 3-16).

The defendant filed its answer denying that this dispute was arbitrable under the provisions of either the collective bargaining agreements or the pension agreements and plans (R. 16-22). The defendant then filed its request for an admission that the various exhibits attached to its answer were true and correct copies of the original documents. The plaintiffs made the requested admission.

Both parties then filed motions for a summary judgment (R. 22-23). After the hearing the District Court entered a decision in favor of the plaintiffs and issued a Memorandum in support of its decision (R. 25-37). The judgment directed the defendant to submit the dispute to arbitration in accordance with the grievance and arbitration provisions of the collective bargaining agreements (R. 38-39). The Defendant has now appealed from this decision (R. 40).

SPECIFICATION OF ERROR

The Court erred in entering judgment for the appellees upon appellees' Motion for Summary Judgment for the reason that the pleadings herein show that the appellant is entitled to a judgment as a matter of law (R. 43).

INTRODUCTION TO ARGUMENT

The dispute that gave rise to this case originated with the demand of the plaintiffs that defendant's right to retire employees at the age of 68 who did not qualify for a pension be submitted to arbitration under the terms of the collective bargaining agreements (R. 7-8). We are not concerned with the details of the particular dispute, but only with the question of whether or not the parties intended that disputes arising out of the interpretation and application of the pension agreements and plans should be subject to the grievance and arbitration provisions of the collective bargaining agreements. Therefore, the question to be determined is the intention of the parties at the time the agreements and plans were negotiated. This intention can easily be determined by an examination of the provisions of the collective bargaining contracts together with the provisions of the coexisting but separate pension agreements and plans.

The District Court in its memorandum decision cites the case of *Textile Workers v. Lincoln Mills*, 353 U. S. 448, and also *General Electric Co. v. Local 205, etc.*, 353 U. S. 547. These cases hold that, if there is an agreement to arbitrate, then such a provision in the collective bargaining agreement can be enforced through an action in a Federal District Court for specific performance. However, it would seem obvious that the Court must first determine that there is a specific agreement to arbitrate the particular dispute involved. This rule is clearly

stated in *Refinery Employees' Union v. Continental Oil Company* (D.C. W.D.La.), 160 F. Supp. 723, as follows:

“Defendant asserts that just because the dispute is ‘grievable’, it does not necessarily follow that it was also arbitrable and insists that this Court must determine as a matter of law whether there has been any agreement to submit the particular issue in question to arbitration. We agree that this is so. *Engineers Ass’n v. Sperry Gyroscope Co., etc.*, 2 Cir., 1957, 251 F.2d 133, and *Local No. 149, etc. v. General Electric Company*, 1 Cir., 1957, 250 F.2d 922.”

This same principle is also clearly stated in *New Bedford Defense Prod. Div. v. Local No. 1113, etc.* (C.C.A. 1st), 258 F. (2d) 522. Here the Court used the following language:

“This appeal is from a decree, under § 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C.A. § 185 ordering appellant Company to submit a certain grievance claim to arbitration. For another case decided by us today involving the same statute, see *Boston Mutual Life Insurance Co. v. Insurance Agents' International Union, AFL-CIO*, 258 F. 2d 516. There, we reaffirmed the position this court had previously taken, that when one of the parties to a collective bargaining agreement invokes the aid of a court of equity, under § 301, and asks the court for a decree of specific performance of a contract to arbitrate, the court, before rendering such a decree, has an inescapable obligation to determine as a preliminary matter whether the defendant did contract to refer the issue to arbitration.”

Furthermore, when the parties to a contract agree to delegate the duty of settling disputes to a third party rather than the courts, such delegation must

be made manifest by plain language. See *United States v. Moorman*, 70 S. Ct. 288, at page 291.

It is defendant's contention that, with certain exceptions, it has not agreed and never intended to agree to arbitration of disputes involving the terms of the pension plans. Therefore, there is no agreement to be specifically enforced by the Court.

I.

THE COURT MUST DETERMINE AND GIVE EFFECT TO THE INTENT OF THE PARTIES

The authorities are in complete accord that, in cases involving a contract or contracts, the court must, if possible, determine the intent of the parties. In 17 C.J.S. § 295 at page 689, we find the following statement:

“The primary rule in the construction of contracts is that the court must, if possible, ascertain and give effect to the mutual intention of the parties, so far as that may be done without contravention of legal principles, statutes, or public policy, and statutes in some jurisdictions embody this rule. Greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent.”

A similar statement is found in 12 Am. Jur. § 227 at page 745. Both of the above authorities cite a vast number of cases in support of their statements.

It was, therefore, the *primary* duty of the District Court to make every effort to determine the intention of the parties by an examination of all the documents involved and not only the collective bar-

gaining agreements. The District Court's Memorandum makes it clear that the pension agreements and pension plans were not considered in arriving at its decision. We refer to the following statement:

"However, it is the collective bargaining agreements which must be construed to determine the narrow issue presented in this case, and not the pension agreements." (R. 28.)

By confining its analysis to the collective bargaining agreements alone without consideration of the pension documents, it seems clear that the District Court has not performed its primary duty. This seems particularly true as the dispute involves the question of arbitrating a controversy over an interpretation of the pension plans, which are separate documents and not part of the collective bargaining agreements.

It would seem apparent that, in order to determine the intention of the parties as expressed in separate but coexisting agreements, all the instruments must be considered.

When several contracts are involved in the same dispute, it is perfectly clear that they should all be considered to see whether the parties intended them to be construed together or as separate contracts.

We find the following language in 12 Am. Jur. § 246 at page 783:

"Where the terms employed to express some particular condition of a contract are ambiguous and cannot be satisfactorily explained by reference to other parts of the contract and the parties have made other contracts in respect of the same subject matter, apparently in pursuance of the same general purpose, it is always per-

missible to examine all of them together in aid of the interpretation of the particular condition; and if it is found that the ambiguous terms have a plain meaning by a comparison of the several contracts and an examination of their provisions, that meaning should be attributed to them in the particular condition. Interpreting contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice so that the intent of the parties may be carried out and the whole agreement actually made may be effectuated. This does not mean that the provisions of one instrument are imported bodily into another, contrary to the intent of the parties. They may be intended to be separate instruments and to provide for entirely different things. All instruments which are executed at the same time and relate to the same subject are treated and interpreted as one. This is done, however, only to effectuate the intention and only where the provisions of the two instruments, if put together, will not be incompatible. Where contracts are put into several instruments, each of which has a sensible meaning and may have a full operation by itself, it would be a hazardous assumption to put them together for the purpose of making them mean, as one, differently from what they could in this separate state. Certainly, the court cannot do such violence to the intentions of the parties and the language in which they are expressed as to consolidate separate instruments where the effect of doing so would be to avoid an essential part of the contract."

Also in 17 C.J.S. § 298 at pages 714 and 715 it is stated:

“As a general rule, sometimes by reason of express statutory provision, where several instruments are made as part of one transaction, they will be read together, and each will be construed with reference to the other. This is true, although the instruments do not in terms refer to each other. So if two or more agreements are executed at different times as parts of the same transaction they will be taken and construed together.

“Where contracts or writings are in fact independent, however, they should not be considered together, although the parties may be the same, or the same subject matter may be concerned, and where there are several contracts in the same matter of different dates, or when one is plainly intended to supersede the other, the later will control. So if there is a plain repugnancy between the provisions of an original contract and those of a supplemental one between the same parties and relating to the same subject matter, the earlier contract must yield to the later as far as the repugnancy extends.”

Certainly it is most improper to consider only one of the documents when an examination of the other documents will clearly show the intention of the parties with respect to all the documents. Yet, that is what has been done in this case. By this simple device the District Court has voided the clear and unmistakable language of the pension agreements and plans and rendered that language meaningless.

In fact, the District Court has not attempted to construe the documents as a single contract nor as separate contracts. It has, in effect, simply ignored the pension agreements and plans.

The defendant submits that the pension plans and

agreements must be given as full and complete force and effect and as full consideration by the Court as the provisions of the collective bargaining agreements. Only in this way can the intention of the parties be properly determined.

II.

THE PROVISIONS OF THE PENSION AGREEMENTS AND PLANS CONCLUSIVELY SHOW THEY ARE DISTINCT AND SEPARATE AGREEMENTS

There is an abundance of evidence in the pension plans and agreements clearly showing that it was not the intention of the parties to make their provisions subject to the grievance provisions of the collective bargaining agreements, and particularly the arbitration provisions.

The first and most conclusive evidence of this intention is contained in Section 9 of the pension agreements entered into between the parties March 14, 1952 (*supra*, pp. 4-5).

This provision shows that the parties hereto consummated a collective bargaining agreement on November 13, 1951, wherein they agreed in Section V thereof to enter into a pension plan covering defendant's employees. The pension agreements show that the terms and conditions of the pension plans were agreed to on March 14, 1952 (Def. Exhibits "A", "D", "G"). On the latter date the collective bargaining agreements of April 10, 1950, as amended November 13, 1951, were in effect, including the

grievance and arbitration clauses. Instead of amending the collective bargaining agreements, the parties agreed to the last sentence of Section 9 so as to specifically exclude the pension plans from the provisions of the collective bargaining agreements. About the only provision of the latter agreements that could affect the pension agreements and plans would be the grievance and arbitration provisions. Thus, it seems perfectly evident that it was clearly the intention of the parties in 1952 to exclude the pension agreements and plans from the arbitration provisions of the collective bargaining agreements, and this was done by the explicit language used in Section 9 of the pension agreements.

It is fundamental that the parties to a contract can amend, limit, extend, supplement, cancel or change any written contract by entering into another written contract. The only limitation is that there must be mutual consent to the second contract and it must not be for an illegal purpose or against public policy. This principle is set forth in 12 Am. Jur. § 405 at page 983 as follows:

“Secondary or New Agreements Affecting Prior Contracts.—The parties to any contract, if they continue interested and act upon a sufficient consideration while it remains executory, and before a breach of it occurs, may by a new and later agreement rescind it in whole or in part, alter or modify it in any respect, add to or supplement it, or replace it by a substitute. Those who have made a contract may always supplement it by another one. However, no abrogation, change, modification, or substitution in a primary contract can be effected by the sole action of one of the parties to it. The

consent of both is required to cancel, alter, or supplant a contract fairly made. The same meeting of minds is needed that was necessary to make the contract in the first place.

“The original contract may be discharged before breach by the mere making of a new agreement or only by the performance thereof, depending upon the intent of the parties. Similarly, after breach of the original contract the claim for damages may be discharged by the performance of a new agreement or by the mere making thereof according to the meaning of the agreement. A new agreement affecting a former agreement may be classified as an accord and satisfaction, an account stated, a compromise and settlement, a novation, or a release, according to whether it meets the requirements of one or another of such particular forms of agreements of discharge, which are discussed in other articles.

“The validity of a mutual agreement to alter, modify, qualify, or supersede by another a contract previously entered into by the parties is unaffected by the proximity in time of such agreement to the primary contract. If it is really in sequence, plainly a distinct and independent affair, it will be valid and effective, even if entered into before the parties separate, after making the primary contract.”

See also 17 C.J.S. § 373 at page 857. It is equally true that the same parties can enter into a separate contract on a separate subject matter and by its express terms exclude it from any of the provisions of the other contract. The only question is whether the parties intended that there should be such an exclusion. In this case, such an intent is conclusively shown by Section 9 of the pension agreements.

Another clear indication of the intention of the

parties is found in the amendments to the pension agreements dated October 15, 1954. The language of the last sentence of Section 9 above quoted (*supra*, p. 5) was changed from "the Collective Bargaining Agreement dated April 11, 1950, as amended by the Supplementary Agreement dated November 13, 1951," to "any collective bargaining agreement." (*Supra*, p. 7.) The purpose of the change is evident when it is realized that the termination dates of the collective bargaining agreements have not been and are not now the same as the termination dates of the pension agreements. For example, the present collective bargaining agreements are for a term ending June 30, 1959 (Sup. R. Def. Exhibits "J", p. 1; "K", p. 1; "L", p. 1), while the pension agreements are to remain in effect until June 30, 1960 (Sup. R. Def. Exhibits "C", p. 1; "F", p. 1; "I", p. 1). Thus it is again conclusively shown that the parties arrived at a clear understanding at the collective bargaining table that the pension agreements and plans would stand by themselves and not be subject to the provisions of the collective bargaining agreements.

Still another indication that the pension plans were not to be subject to the grievance and arbitration provisions of the collective bargaining agreements is found in the provisions of Sections 4 and 5 of the plans (*supra*, pp. 5-7). These sections, in effect, provide the grievance and arbitration procedure with respect to the pension plans. Obviously, if it had been intended to make the provisions of the plans

subject to the grievance and arbitration provisions of the collective bargaining agreements the above-quoted provisions would be wholly unnecessary. It is equally obvious that the intention was to provide for arbitration of the provisions of the pension plans only with respect to three items; namely, age, earnings and length of service. Yet the District Court by the simple device of saying that this case is brought under the provisions of the collective bargaining agreements has held that they are the only agreements to be construed by the Court; therefore, the limitations set forth in the pension plans become wholly meaningless. This decision, then, leaves it to the arbitrator and not the Court to construe every and all the provisions of the pension plans without any limitation and to determine the intention of the parties. This decision ignores the specific limitations set forth in the pension plans and circumvents and nullifies the obvious intention of the parties.

The reason for the provision that only three matters under the pension plans should be subject to arbitration seems clear. "Company" is defined as Anaconda Copper Mining Company (now The Anaconda Company). "Subsidiary Company" is also defined (Sup. R. Def. Exhibits "A", p. 7; "D", p. 7; "G", p. 7). It is common knowledge that the defendant herein has operations all over the United States, and that the intention was to have a uniform plan. The trust fund that must be provided to insure the payment of pensions to its retired employees is a very substantial fund. Furthermore,

the plans must be approved by the Commissioner of Internal Revenue before the payments under the plans are deductible under the provisions of the Internal Revenue Code (Sup. R. Def. Exhibits "A", p. 1; "D", p. 1; "G", p. 1). It is most natural and understandable that defendant would want the interpretation of the plans made by a Court familiar with the law rather than an arbitrator who might or might not be familiar with the law and from whose decision it might or might not have the right of appeal. Furthermore, to insure uniformity, the plans specify that they should be "construed and administered in accordance with the Laws of the State of New York." (Sup. R. Def. Exhibits "A", p. 16; "D", p. 16; "G", p. 16.) In this connection the lower Court ignored the applicable law and left this matter for the arbitrators to determine.

It is significant that in all the collective bargaining agreements since Section 9 was agreed to in 1952, there has not been and is not now any mention of the pension agreements or plans in the collective bargaining agreements. This again indicates that the pension plans and agreements were intended to be separate and distinct agreements and to stand by themselves.

Defendant submits that both the collective bargaining agreements and the pension agreements and plans must be considered in determining the intention of the parties, and the intention to exclude pension disputes from the provisions of the collective bargaining agreements is conclusively shown by the

above-cited sections of the pension plans and agreements.

III.

THE LANGUAGE OF THE PENSION AGREEMENTS AND PLANS IS SO CLEAR THAT THERE IS NO NEED FOR CONSTRUCTION

It should be pointed out that the pension plans and agreements were not instituted unilaterally by the defendant but were entered into after agreement had been reached over the collective bargaining table. There is a legal presumption that the parties knew and understood what they were agreeing to when they entered into the pension agreements. It seems inconceivable that anyone could read the statement in Section 9 of those agreements that each is a "distinct and separate document, which, it is agreed, is not to be and shall not be construed to be a part of, or collateral or supplemental to, any collective bargaining agreement" and then conclude that the very agreement referred to is subject to the collective bargaining agreements. Yet in deciding a suit brought under the terms of the collective bargaining agreements based on an alleged breach of the pension plans, the District Court renders this language meaningless and declares that the pension plans are subservient to the collective bargaining agreements. Here there is no room for argument that it was the intention of the parties to exclude the provisions of the pension plans from arbitration. This is clearly expressed in Section 9. Where the language of a

contract is clear and unambiguous, as in this case, there is no need for construction. In 12 Am. Jur. § 227 at page 747 we find the following:

“It is not within the function of the judiciary to look outside of the instrument to get at the intention of the parties and then carry out that intention regardless of whether the instrument contains language sufficient to express it; but their sole duty is to find out what was meant by the language of the instrument. This language must be sufficient, when looked at in the light of such facts as the court is entitled to consider, to sustain whatever effect is given to the instrument. Taking into consideration this limitation, it may be said that the object of all rules of interpretation is to arrive at the intention of the parties as it is expressed in the contract. In other words, the object to be attained in interpreting a contract is to ascertain the meaning and intent of the parties as expressed in the language used.”

Also, 17 C.J.S. § 294 at pages 683-685 states:

“A court will not resort to construction where the intent of the parties is expressed in clear and unambiguous language, but will enforce or give effect to the contract according to its terms, in the absence of fraud or other grounds affecting enforcement according to its terms.”

We submit that Section 9 of the pension agreements falls fully within the above rules and relieves the Court from the necessity of construing the grievance clauses of the collective bargaining agreements.

IV.

THE DISTRICT COURT RECOGNIZED THAT EXCEPTIONS CAN BE MADE FROM THE GRIEVANCE AND ARBITRATION PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENTS

The District Court in its analysis of the provisions of the grievance and arbitration procedure under the collective bargaining agreements points out that the parties included a provision that "No question of a change in the wage scale or differentials shall be the subject of arbitration." (R. 31.) It then concludes that these two items are the only ones that the parties desire to exclude. Thus, the Court recognized the right of the parties to exclude certain matters from the so-called broad provisions of the collective bargaining agreements but only to the extent that the limitations are set forth in those agreements. Defendant knows of no rule of law or reason that will not permit the parties to make a separate and distinct agreement providing for a third exception from the arbitration provisions of the collective bargaining agreements. That is exactly what has been done in this case. It is absurd for the District Court to say that the only exception that can be made must be in the agreement itself or in a supplement to the collective bargaining agreements (R. 34). In the District Court's Memorandum we find the following.

"In *Local 205, etc. v. General Electric Co.*, 233 F. (2d) 85, affirmed, 353 U. S. 547, the Court of Appeals for the First Circuit said:

“ ‘The scope of an arbitration pledge is solely for the parties to set, and thus the determination of whether a particular dispute is arbitrable is a problem of contract interpretation.’ ”

This quotation definitely shows that this may be done and that the scope of the arbitration clause may be limited by the parties. Here this was done in documents separate from the collective bargaining agreements.

If you accept the theory of the District Court it would be impossible for the parties to negotiate a separate contract on some matter not covered by the then existing collective bargaining agreements and not have the provisions thereof subject to the grievance and arbitration provisions of the collective bargaining agreements. It would only be necessary to file a suit for specific performance under the collective bargaining agreements and the terms and conditions of the separate agreement would be subject to arbitration even if the parties had agreed they were not arbitrable. Such a situation would not promote harmonious labor relations. This method could be used by either party to defeat the clearly expressed intention of the parties that the provisions of the separate agreement would not be subject to arbitration. Imagine a situation such as this: The parties enter into contract “A” with an arbitration provision. Subsequently they enter into contract “B” and provide that “B” will not be subject to the arbitration provisions of contract “A”. Both “A” and “B” involve conditions of employment. Then one of the parties files suit to compel

the arbitration of a question arising under the provisions of contract "B" but alleges that the suit is filed for specific performance under the provisions of contract "A". If the decision of the District Court in the present case is sustained, then the provisions of contract "B" become subject to arbitration under contract "A" despite the fact that contract "B" provides otherwise. A decision by the Court of Appeals to that effect would upset and confuse collective bargaining relations throughout the entire United States.

Furthermore, the District Court holds that because the defendant did not insist in the negotiations in 1956 that a clause be included in the collective bargaining agreements excluding pension disputes, it thereby demonstrated an intention not to exclude these disputes (R. 35). It is much more logical to say that the failure of the plaintiffs to insist on a provision making such disputes subject to arbitration under the collective bargaining agreements, or to insist on amending the pension agreements and plans to so provide, was an indication of the intention on the part of the plaintiffs to exclude the disputes from arbitration. Plaintiffs are the complaining parties, and certainly the burden was upon them to demand the necessary changes to make sure that the pension agreements and plans were subject to arbitration. They were fully aware of the disputes at the time of these negotiations in June, 1956 (R. 24), yet they did not take advantage of their opportunity to eliminate Section 9 from the pension

agreements or to amend the limitations set forth in Sections 4 and 5 of the plans.

The District Court quotes the provision from the collective bargaining agreements the sentence "This contract is exclusive" etc., and concludes that this sentence prevents any consideration of the pension plans and agreements in determining the question of arbitrability. We feel that this conclusion is without merit. Certainly the same parties may at any time sit down and mutually agree to another contract on a subject matter not included or covered by the collective bargaining agreements and provide therein that it would or would not be subject to the provisions of the collective bargaining agreement. See: 12 Am. Jur. § 405 at pages 493 and 494; also 17 C.J.S. § 373 at page 587. If this right did not exist it would be impossible to correct inequities or adjust controversies that might arise during the term of the contract. We are certain that such a condition would not be acceptable to either party as it would render their contractual relations too inflexible to promote harmonious labor relations.

CONCLUSION

We submit that the District Court committed manifest error in granting plaintiffs' motion for summary judgment and in denying that of defendant in the face of the admitted facts in this case.

We submit that the judgment for the plaintiffs

should be dismissed with directions to enter a judgment in defendant's favor.

Respectfully submitted,

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No. 16,055

United States Court of Appeals
For the Ninth Circuit

THE ANACONDA COMPANY,
a corporation,

Appellant,

VS.

BUTTE MINERS UNION NO. 1 OF THE
INTERNATIONAL UNION OF MINE, MILL
AND SMELTER WORKERS, et al.,

Appellees.

BRIEF OF APPELLEES.

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BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

The statement of the case in appellant's brief is accurate and complete *except in the one respect necessary for a fair understanding by the Court of the one basic issue in the case.* This relates to appellant's description of the nature of appellee's suit in the District Court as a suit to "compel the defendant to arbitrate the question of the right to retire employees at the age of 68 who did not qualify for pensions" (p. 9).¹ As we will show in our argument, this ambiguous formulation serves to conceal the very ques-

¹References in this form are to appellant's brief.

tion in issue. That question is whether the discharges by appellant of its employees who have reached 68 years of age are arbitrable under *the collective bargaining agreements* between appellant and appellees even though appellant claims that the discharges were proper under the separate pension agreements and plans² between the parties.

The District Court answered this question in the affirmative. We submit that the answer was indisputably correct.

I.

THE DISCHARGES OF THE EMPLOYEES ARE GRIEVANCES WHICH ARE ARBITRABLE UNDER THE COLLECTIVE BARGAINING AGREEMENTS. ANY JUSTIFICATION FOR THE DISCHARGES THAT APPELLANT MAY HAVE UNDER THE PENSION PLANS IS A DEFENSE ON THE MERITS IN ARBITRATION, NOT AN ANSWER TO THE DEMAND FOR ARBITRATION.

A.

The title of this point is perhaps unconventionally long, but it is an effort to present the sole issue on this appeal in summary but complete form. This is important because appellant's brief, as we have already indicated, conceals the question.

This is *not* a suit to compel arbitration under the pension plans, but a suit to compel the arbitration of grievances under the collective agreements between the parties. The admission in the following allegation in appellant's answer to the complaint makes it clear

²Referred to hereinafter as the pension plans.

beyond doubt that appellees, as parties to the collective bargaining agreements with appellant, sought arbitration under the agreements of the grievances resulting from the discharge of employees who had reached 68 years of age (R. 18-19):³

“Admits that in each of the company’s plants the defendant company has adopted a policy of termination, and is terminating, the employment of member employees upon their attainment of the age of 68 even though the said employee members are not eligible for pension; that at each of the said plants the plaintiff unions representing the employee members have listed said terminations as grievances; that at each of said plants the defendant company has denied relief on these claims through the grievance procedures; that at each of said plants the plaintiff unions have demanded arbitration of the individual disputes but that the said defendant company has refused to submit the individual grievances to arbitration and has, and still does, take the position that the provisions of the pension plan and their application are not subject to arbitration. Denies that the disputes arising from the termination of employment of employees over 68 years of age are not eligible for pension are proper subjects of the grievance procedure and of arbitration, and that the defendant company is required by its agreements with the plaintiffs to submit grievances arising out of the termination of employment of employee members not eligible for pension under said Section 2.1 (c) of the pension agreements to arbitration. . . .”

³As in appellant’s brief, references in this form are to Volume I of the Record.

It is therefore not accurate to describe this as a suit "to compel the defendant to arbitrate the question of the right to retire employees at the age of 68 who do not qualify for pensions". This formulation makes it seem that appellees seek to compel arbitration *under the pension plans*. They do not. They seek to compel arbitration *under the arbitration provisions of the collective agreements*.

A re-statement of the basic facts will help set the issue in context. As appellant's brief sets forth (pp. 2-8), appellant (the employer) and appellees (the labor organizations) were parties to collective bargaining agreements and to the separate (but identical) pension plan agreements covering the employees at Butte, Great Falls, and Anaconda, Montana. Shortly after the pension plans were amended on October 15, 1954, appellant, to quote from its brief (p. 8):

"adopted a policy of retiring employees at the age of 68 in accordance with the provisions of Section 2.1(c) of the plan (R. 18). Some of these employees did not have the required number of years of service to entitle them to pension payments under the plan. The plaintiffs objected to the retirement of these employees and presented grievances concerning them in accordance with the grievance procedure set forth in the collective bargaining agreements. The plaintiffs took the position that the defendant could not retire an employee at the age of 68 unless he had sufficient years of service to entitle him to a pension. The defendant refused to accept these grievances and to process them through the arbitration procedure provided for in the collective bargaining agreements (R. 18)."

The suit, then, as the complaint shows (R. 8-9) and the answer admits, as we have seen, is a suit to compel arbitration under the collective agreements, not under the pension plans.

The ambiguity in the phrasing of the issue in appellant's statement of the case appears in different guise throughout its brief. Thus, in the introduction to the argument, appellant asserts that the question is (p. 10):

"whether or not the parties intended that disputes arising out of the interpretation and application of the pension agreements and plans should be subject to the grievance and arbitration provisions of the collective bargaining agreements."

And at the end of the same section, appellant argues that (p. 12):

"with certain exceptions, it has not agreed and never intended to agree to arbitration of disputes involving the terms of the pension plans."

Then, in Point I of its brief, appellant says that (p. 13):

"the dispute involves the question of arbitrating a controversy over an interpretation of the pension plans, which are separate documents and not part of the collective bargaining agreements."

In the first paragraph of Point II, appellant asserts (p. 16):

"that it was not the intention of the parties to make their provisions subject to the grievance provisions of the collective bargaining agreements, and particularly the arbitration provisions."

In fact, Point II is devoted almost entirely to the argument that the dispute is under the pension plans and not under the collective agreements.

An analysis of Points III and IV of appellant's brief further indicates that the core of appellant's argument—though couched differently at different places in the brief—is that appellees seek arbitration under the pension plans and not under the collective agreements.

This presentation of the issue flies in the face of the pleadings, as we have seen. Also, as we will now try to show, it is illogical in that it stands the real issue upside down, so to speak, and would render an arbitration provision in a collective agreement nugatory if the employer merely asserts a defense to the grievance, whether the defense arises from a separate pension plan or in some other way.

B.

The fact of the matter is that the dispute about the discharges in this case is no different in essence from countless others which arise all the time under collective agreements. An employee is discharged. The union claims that the discharge is unjustified. The employer argues that it is not—that, for example the employee was incompetent, or insubordinate, or stole company property, or was absent too frequently without permission. The fact that the employer has, or thinks he has, a defense is not of course a reason why the arbitration provision of the collective agreement is inapplicable. The defense is a de-

fense on the merits to be made before the arbitrator, not a reason for opposing the process of arbitration itself.

In this case, appellant discharged employees because they were 68 years of age. Appellees, the labor organizations under the collective agreements with appellant, presented the discharges as grievances. Appellant resisted, so appellees demanded arbitration under the arbitration provisions of the collective agreements. The fact that appellant claims that the pension plans permit the discharges makes the case no different than the case in which the employer claims that an employee was discharged because he was inefficient or a thief or for some other reason. The defense is a defense which has to be made to the arbitrator when the case comes to be heard on the merits. It is not an agreement against arbitrability itself.

The analogies we have drawn in discharge cases under labor agreements can be extended to any lawsuit in which the defendant has or believes he has a defense. Thus, if appellant's argument were sound, a murder defendant could argue that since he claims he killed in self-defense, the indictment should never go to trial at all and should be dismissed. In fact, if appellant is right, no civil or criminal court has jurisdiction at all once there is an alleged defense on the merits.

This argument of appellant's was succinctly answered by the Court below (R. 36):

"Indeed, defendant admits that a dispute exists but in effect argues that because it has a defense

in the pension agreements to the claim of plaintiffs that it is not a bona fide dispute. The fact that a defense may exist to a claim does not make the claim frivolous or baseless, and the validity of the defense should be decided by the tribunal to which the parties have agreed to submit their disputes—in this case, the arbitrators—and the Court should not usurp that function under the guise of determining whether there is an arbitrable issue.”

It is also not inappropriate to note that the same argument as appellant makes here was made by a wholly-owned subsidiary of appellant, the American Brass Company, in a voluntary arbitration relating to the identical issue between that company at its Buffalo, N.Y. plant and Local 593 of the International Union which is one of the appellees in the instant case. In that case, unlike this, American Brass voluntarily agreed to submit the dispute as to arbitrability itself to arbitration. In an unpublished award and opinion, Dean J. D. Hyman of The University of Buffalo School of Law rejected the same argument now made by appellant on the basis of a pension plan *in haec verba* with the one involved here and held that the dispute is arbitrable. (It should also be noted that in the subsequent voluntary arbitration on the merits, Dean Hyman held that Section 2.1 (c) of the pension plan—similarly numbered, as here, because the plans are identical in every respect, even as to form—did not permit termination of employees at age 68 unless they were entitled to pensions and that,

therefore, the termination of such employees was improper under the collective agreement.)⁴

Whether or not Section 2.1 (c) of the pension plans permits the involuntary retirement of employees when they become 68 years of age even though they are not entitled to pensions—and of course we agree with Dean Hyman that it does not—the matter is one to be determined in arbitration. A conclusion that the matter is not arbitrable would render arbitration clauses in collective agreements meaningless and be a severe blow to the very principle of arbitration.

II.

TERMINATION OF EMPLOYMENT IS ARBITRABLE UNDER THE COLLECTIVE AGREEMENTS AND THE FACT THAT THE PENSION PLANS ARE IN SEPARATE AGREEMENTS IS IRRELEVANT.

Although appellant made an issue of the matter in the District Court, appellant does not now argue that grievances about discharges or terminations of employment are not covered by the provisions of the collective agreements relating to the presentation of grievances and the arbitration of disputes. Judge Murray's careful analysis of the agreements (R. 29-33) has apparently set that matter at rest.

⁴Even though Dean Hyman's awards and opinions are unpublished, we feel free to refer to them not only because the American Brass Co. is a wholly-owned subsidiary of appellant, but also because the awards and opinions were referred to in the argument below on the motions for summary judgment. Dean Hyman's award and opinion on the matter of arbitrability is dated August 27, 1956, and his award and opinion on the merits is dated February 4, 1957.

Appellant has then abandoned the argument that disputes relating to discharges are not arbitrable under the collective agreements. Appellant argues, however, that the pension plans are in agreements separate and distinct from the collective agreements and that the pension plans do not provide for the arbitration of the disputes in question. Appellant also lays stress (Point III, p. 22) on a clause in the pension plans that the plans are not to be construed as a part of or collateral or supplemental to any collective bargaining agreements. Different phases of this argument appear in each of the four points in appellant's brief.

This argument of appellant's is actually a variation of the argument we have dealt with in Point I and likewise begs the question. Since appellees are demanding arbitration under the collective bargaining agreements and not under the pension plans, it is irrelevant that the pension plans are separate and distinct or that the pension plans do not provide for the arbitration of disputes such as these. And merely because appellant relies on the pension plans as justification for the termination of the employment of appellees' members an order to arbitrate under the collective agreements would not make the pension plans "part of, or collateral or supplemental to" the collective bargaining agreements.

Suppose, for example, that state or federal legislation was enacted which required appellant to discharge all employees who are 68 years old and that appellant thereupon discharged all such employees

If appellees then demanded arbitration under the collective agreements, would it be logical for appellant to resist it because the statute is separate and distinct from the collective agreements or because the statute does not provide for arbitration? Would an order to arbitrate under the collective agreements mean that the Court was making the statute "part of, or collateral or supplemental to" the collective bargaining agreements?

The answer to these questions is obviously in the negative. Otherwise, arbitrability would always be determined by the nature of a defense on the merits and not by the character of the grievance and the provisions in the collective agreement relating to arbitration.

The District Court made two further irrefutable answers to this argument of appellant's (R. 34-35):

"Defendant also seeks some support for its position in the provision of the pension agreements to the effect that such agreements are separate and distinct documents and are not to be construed as a part of or collateral or supplemental to any collective bargaining agreement. This provision of the pension agreements, however, seems to the Court to weaken the position of the defendant, for if the pension agreements could be considered as amending or supplementing the collective bargaining agreements, then they might be considered, as the company urges, in determining whether the present controversy presents an arbitrable issue under the collective bargaining agreements. Being by their express provisions

not amendatory of or supplemental to the collective bargaining agreements, the pension agreements cannot be considered in deciding the issues of arbitrability under the collective bargaining agreements. There is likewise a provision in each of the collective bargaining agreements that 'This contract is exclusive for its entire term and not subject to further negotiation and is to cover all contract relations between the parties for its entire term', which prevents any recourse to the pension agreements in determining the question of arbitrability presented here.

There is this additional circumstance which impels the Court to the conclusion it has reached. The pension agreements were all in existence at the time the last collective bargaining agreements with the broad, all inclusive provisions for disposing of controversies and grievances previously pointed out were executed. At that time, had the parties intended to exclude such a controversy as the instant one from the grievance procedures they set up on the ground that it was covered by the pension agreements, as defendant now maintains, it would have been a simple matter to so state in the collective bargaining agreements as they did with respect to questions concerning wage scales and differentials."

In other words, if the parties had so intended, a clause in the collective bargaining agreements to the effect that any dispute arising because of any action appellant took under the pension plans would not be a grievance and would not be arbitrable under the collective agreements, would have put the horse before

the cart. Without such a clause, appellant is trying to put the cart before the horse.

CONCLUSION.

This dispute has already lasted for four and a half years. Such a delay makes a mockery of collective bargaining and particularly of the concept of arbitration. It is, and has long been, congressional and federal judicial policy to foster and enforce labor arbitration in industries affecting commerce. *Textile Workers & Lincoln Mills*, 353 U.S. 448, 455, 460. And "if arbitration is here to stay", as Judge Folmer remarked in the passage quoted in the opinion below (R. 31) from *Insurance Agents International Union v. Prudential Insurance Co.*, 122 Fed. Supp. 869, 872, the effort made by appellant in this case to resist the arbitration provisions of the collective agreements should not be allowed to succeed.

It is therefore respectfully submitted that the judgment of the District Court ordering appellant to submit the dispute between the parties to arbitration under the collective bargaining agreements should be affirmed, with costs.

NATHAN WITT,
Attorney for Appellees.

THESE THINGS ARE ALL PARTS OF THE SAME WHOLE, AND
THEY ALL HAVE THE SAME PURPOSE.

AND

THEY ALL HAVE THE SAME

MEANING, AND THEY ALL HAVE THE SAME
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United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ANACONDA COMPANY, a corporation,
Appellant,

vs.

BUTTE MINERS' UNION NO. 1 OF THE
INTERNATIONAL UNION OF MINE,
MILL AND SMELTER WORKERS, et al.,
Appellees.

APPELLANT'S REPLY BRIEF

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No. 16,055

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ANACONDA COMPANY, a corporation,
Appellant,

vs.

BUTTE MINERS' UNION NO. 1 OF THE
INTERNATIONAL UNION OF MINE,
MILL AND SMELTER WORKERS, et al.,
Appellees.

APPELLANT'S REPLY BRIEF

ARGUMENT

It would appear from the reading of the brief of appellees that it is designed to lead the Court to believe that appellant is trying to defend this suit on the grounds it has a defense to the termination of 68-year-old employees under the provision of the pension plans. That is not the case at all. We have not and do not intend to argue the merits of that dispute before this Court for we do not believe such an argument is relevant in this case.

The question of whether or not the appellant has the right to terminate 68-year-old employees without

a pension is not involved here. The question to be decided is whether or not *any question regarding the interpretation and application of the pension plans is subject to arbitration under the provisions of the collective bargaining agreements.*

Appellant reiterates that it was never the intention of the parties to make the pension plans subject to arbitration under the collective bargaining agreements and that the evidence that such was not its intent is conclusively shown by the provisions of the pension agreements and pension plans.

Reference is made in appellees' brief (pp. 8 and 9) to the decision of Dean J. D. Hyman of the University of Buffalo School of Law. This arbitration decision has no relevancy to this case as admittedly the parties in that case voluntarily agreed to submit the question of arbitrability to the arbitrator. Obviously the parties can mutually agree to pursue such a course and waive any right to have their day in court. However, it does not follow that appellant must also waive its rights under the pension agreements and plans to have the question of arbitrability of disputes arising out of the interpretation or application of the provisions of the pension plans decided by a court of law.

On page 11 of appellees' brief we find the same theme that runs throughout the entire brief; i. e., that appellant is trying to have the question of arbitrability determined by the nature of the defense on the merits. Nothing could be further from the truth. Appellant does not even argue the question of its right to retire the 68-year-old employees. It does argue that it has

the right to make exceptions from the arbitration provisions of the collective bargaining contracts and that it was the specific intent of the parties to make such an exception in the case of the pension plans. Just as in the case of wages and differentials which are not subject to arbitration, the pension plan disputes have likewise been excepted from the arbitration provisions of the collective bargaining agreements.

Reference is made in appellees' brief to the fact that appellant did not include a clause in its collective bargaining agreement excluding the disputes that might arise because of any action taken under the provisions of the pension plans. Appellees knew shortly after October 15, 1954, that the appellant was refusing to arbitrate a dispute arising under the provisions of the pension plans. Yet, although the appellant voluntarily agreed to reopen the pension plans for negotiation in June of 1956, no attempt was made by the union to amend the pension agreements and plans to eliminate the restrictive clauses such as Section 9 of the agreements and Sections 4 and 5 of the plans. It would seem apparent that appellees accepted the position of appellant as being correct at that time. It was not until October 22, 1957, that this suit was filed. Thus for a period of almost three years the appellees passively accepted the interpretation of the appellant. Certainly it was up to them to change the plans and agreements in 1956 if they disagreed with appellant.

CONCLUSION

We respectfully submit that appellees have failed to

answer the arguments which we have submitted in our brief of appellant and that the judgment for appellees should be dismissed with directions to enter a judgment in favor of appellant.

Respectfully submitted,

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No. 16057 ✓

United States Court of Appeals
For the Ninth Circuit

MAX T. EDWARDS and GILBERT EDWARDS, *Appellants*,
vs.
UNITED STATES OF AMERICA, *Appellee*.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANTS

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United States Court of Appeals

For the Ninth Circuit

MAX T. EDWARDS and GILBERT EDWARDS,	} No. 16057
<i>Appellants,</i>	
vs.	
UNITED STATES OF AMERICA,	<i>Appellee.</i>

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANTS

STATEMENT OF JURISDICTION

The appellants were indicted December 13, 1956, on twenty-one counts of claimed violations under 18 U.S.C. Sec. 152¹ in connection with the bankruptcy of Edwards Shaver Departments, Incorporated (R. 3-14). The number of counts resulted largely from a three-fold statement of offenses connected with six separate transfers of funds from Edwards Shaver Departments, Incorporated, totaling \$36,500.00 and the transfer of a cash register and an adding machine. The appellants, by verdict of the jury (R. 29-32) were found not guilty on twelve counts, guilty on eight counts, and appellant Gilbert Edwards was found guilty of one additional count (R. 32). Of the nine counts last referred to charging fraudulent acts, six charged concealment of specific sums transferred from Edwards Shaver Departments, Incorporated; one count charged concealment of a

¹See Appendix C.

cash register; one count charged the transfer of the same cash register; and the final count charged concealment by Gilbert Edwards only of an adding machine (R. 3-14). Appellants filed motion for judgment of acquittal and alternatively for a new trial (R. 33-37) which motions the trial court denied.² Judgment, sentence and commitment were entered by the trial court on the 24th day of March, 1958 (R. 38,42). Appeal from this final judgment to this court is pursuant to 28 U.S.C. 1291 and 18 U.S.C. 3231. Appellants each filed Notice of Appeal on the 27th day of March, 1958 (R. 45-48) pursuant to Federal Rule of Criminal Procedure 37, and have perfected this appeal pursuant to Federal Rule of Criminal Procedure 39 and the rules of this court.³

STATEMENT OF THE CASE

A. History of Companies

Max T. Edwards is a Canadian subject, one of four brothers, Bert, Paul, Gilbert, and Max (R. 444, 503). Prior to 1946 and at all times since he was the owner and manager of a retail shaver business in Vancouver, B.C., known as Edwards, Ltd. (R. 444). In 1949, Max and Bert Edwards purchased a Vancouver, B.C., retail cutlery business known as Lewis Cutlery, Ltd., but this joint ownership continued only two or three years (R. 450-451). Lewis Cutlery, Ltd., has continued to be op-

²These motions were denied March 24, 1958, as shown by the docket entries (R. 62). The docket entries, however, are abbreviated and were not printed in full (R. 49) although designated as part of the record on appeal on April 22, 1958. This designation was sent by the District Clerk to the United States Court of Appeals at San Francisco (R. 59-64, Item 37).

³The writer of this brief first entered an appearance in this case as counsel of record after appeal taken (R. 58).

erated at all times since by Max T. Edwards (R. 444-445).

In 1946 Max T. Edwards commenced his own retail shaver business in Seattle, Washington, under the name of Edwards Electric Sales & Service Company (R. 340-341). This business was later incorporated July 25, 1946 (Pl. Ex. 5), he becoming the sole stockholder (R. 126). Thereafter, considerable effort was expended by him in building up the business (R. 684). In 1948 the company added a retail store in Portland, Oregon (R. 448). Meanwhile, in 1946 Max T. Edwards organized and owned (R. 126) a California corporation under the name of Edwards Electric, Inc., to operate retail shaver stores in California (R. 448). In the latter part of 1946 this corporation opened a store in Los Angeles and shortly thereafter one in San Francisco (R. 449).

In 1949 the companies began to expand by opening up concessions in department stores (R. 451-453). It was about this time that Gilbert Edwards was employed by the business as sales manager of the concessions at a salary of \$350 per month, plus expenses (R. 702). Shortly thereafter the name of the Washington corporation was changed to Edwards Shaver Departments, Incorporated (Pl. Ex. 5). Concessions were opened up in Los Angeles, San Francisco, Portland and Seattle (R. 100, 452-453, 703; Ex. A-5). By the end of 1951 there were concessions in the Broadway Department Stores in Los Angeles, Macy's in San Francisco, Olds & King in Portland, and the Bon Marche in Seattle (R. 100, 452-453). The concession agreements, generally, required stores to be closed as soon as possible (R. 453) but not immediately (R. 453) in order that store cus-

tomers might be saved for the concessions and sent to the department store concessions (R. 453, 720). Accordingly, in time, stores were closed in Los Angeles, San Francisco, and Portland (R. 707, 452). However, the Seattle store was permitted to remain open by the Bon Marche for a time (R. 776-777) and was, in fact, open at the time of the events hereinafter referred to, although in process of being closed (R. 324-325, 329, 334, 529-530).

Sales volume in the department store concessions continued to increase and the store concessions were generally profitable (R. 278). The stores, however, did not prove to be profitable, but were, in fact, a serious drain because of their losses (R. 278-279). Because, however, the concessions were profitable, expansion of concessions was contemplated. In fact, in 1950 and 1951 Max T. Edwards was studying the matter of opening up new concessions (R. 461-462) pursuant to invitation from Macy's in the various Macy stores throughout the country (R. 454-460). Financial limitations, however, prevented this expansion (R. 705). The matter of shaver concession expansion into Macy Department Stores was again reopened toward the end of 1952 (12-11-52) (R. 464-468, 705) (Exs. A-13 and A-14), but again the program was not completed because of lack of finances. However, in 1952 additional profitable concessions were opened up for the retail sale of foreign-made cutlery in department stores in Los Angeles, San Francisco and Seattle (R. 464).

In addition, consideration was given to expansion eastward (R. 482, 603). In fact, early in 1952 (R. 666) consideration was given to incorporating in anticipa-

tion of expansion in the East (R. 482, 655-656). However, it was not until February 9, 1953, that two additional corporations were organized, Shaveraid, Inc. (Pl. Ex. 26) and Cutlaire, Inc. (Pl. Ex. 25), Nevada corporations, being so organized by Gilbert Edwards in Seattle (R. 558-559, 671) on the advice of legal counsel for the corporation (R. 483, 603, 653-656). It was expected that these corporations would go into eastern department store concessions or the jobbing and wholesaling end of the shaver and cutlery business (R. 655-656), the share interest of the brothers to be later determined (R. 674). This, however, did not materialize because of the events hereinafter related. Max T. Edwards believed the potential or future was good (R. 556) and expansion was planned (R. 511, 512, 514, 692, 759).

B. Financial Condition of Companies and Their Financing

The Washington-California corporations here involved were under-capitalized (R. 322, 715) and, therefore, had to rely heavily on economies, on credit from creditors and on borrowings. The concessions were generally profitable (Pl. Ex. 13, 39; R. 278, 284-288, 313-316, 331, 686-687; Ex. A-5, A-6, A-7, A-8) but the stores were not (R. 449). After 1950 Max T. Edwards, although he devoted substantial time to the business (R. 470), took no salary from the Washington corporation, just reimbursement of expenses (R. 279, 599, 630, 472, 632-633). His income was from his Canadian stores (R. 628). Gilbert Edwards' salary was a modest one of \$350 a month and expenses (R. 290, 292, 342-343, 348, 774-775).

The suppliers (long term) (R. 716-717) such as Remington, Schick, Sunbeam, Graybar, General Electric, Marshall-Wells, Hall & Company, Horne & Cox, and others, extended liberal credit (R. 104, 124-125, 475). The largest creditor, Marshall-Wells (R. 106) in 1952 agreed to a long-term repayment arrangement (R. 106, 475, 768; Ex. A-15). Remington, however, stopped giving credit (R. 772). Generally, credit was extended with Christmas dating so that creditors were generally paid shortly after the Christmas season (R. 259-260). The companies were slow pay always (R. 322, 474, 475, 715). They received collection letters from creditors at all times (R. 547, 735), but managed to keep the creditors satisfied (R. 306, 321, 716) until the latter part of February, 1953 (Br. p. 9, *infra*). This situation about slow pay, collection letters, and liberal extension of credit had always been true in 1951 and 1952 (R. 546-547, 734-735), and Max T. Edwards didn't consider these a serious threat (R. 547). Gilbert Edwards didn't consider the companies' situation any different than in 1950, 1951 or 1952 (R. 744). The business was growing (R. 747).

The third and major source of financing was from the proceeds of loans. This helped build volume (R. 716). Bert and Gilbert Edwards lent the companies sums on at least four different occasions, each borrowing the money from other sources on his own collateral in order to provide the funds needed by the Max T. Edwards companies (R. 486-487, 717, 774, 779-780).

The principal source of loans, however, came from Max T. Edwards and his Canadian companies (R. 292, 485, 486-487). He borrowed heavily from Canadian

banks (who were not authorized to lend money to the Washington-California corporations) (R. 673) and Max T. Edwards would then lend the proceeds of these loans to the Washington and California corporations (R. 294, Ex. A-4; R. 485, 715) and was owed substantial sums on that account. Max T. Edwards made no charge to the corporations for the interest (R. 292) which he, in turn, had to pay to the Canadian banks, so in effect, the companies got the benefit of those loans interest-free (R. 292-293). At 6%, this amounted to \$1,594.44 in 1952 and \$150.16 in 1953 (R. 293). Were it not for the loans made by Max T. Edwards, the companies could not have continued to operate (R. 292, 307).

The loans from the Canadian banks to Max T. Edwards were evidenced by demand notes signed by Max T. Edwards and his wife and by his Canadian companies (R. 484-485, 506, Pl. Ex. 17; Exs. A-4, A-30; R. 623). To obtain these loans, Max T. Edwards had pledged his life insurance and Mr. and Mrs. Max T. Edwards had mortgaged their home and automobiles as security (R. 486-487).

In the latter part of 1952 the Canadian banks called their loans (R. 488, Pl. Ex. 17). They were to be paid about Christmas time (R. 471, 649, 622; Exs. A-17, A-30). The Washington-California corporations at that time were heavily indebted to Max T. Edwards for loans made by him to the corporations from the proceeds of the Canadian bank loans (R. 120-121, 484-486).

The corporations were entitled to various sums payable in January, 1953, on account of the business done by them in the concessions. To obtain funds with which to repay Max T. Edwards so that he in turn could repay

the Canadian bank loans, the corporations obtained advances on account from the department store concessions in various amounts (substantial sums remaining owing, however) (R. 176, 183, 185, 192, 205, 208-209, 226, 414; Pl. Exs. 17, 20, 21), a procedure customary with concessionaires (R. 185), the accounts of the corporations being charged accordingly (R. 192, 292, 296, 299; Ex. A-4; R. 301, 490, 491; Exs. A-17, A-18). The Washington-California corporations then turned these advances over to Max T. Edwards, whose account was charged therewith (R. 120, 121, 122). He, in turn, took the funds so derived and converted them into Canadian funds in order to transmit to Canada to pay Canadian banks (it being cheaper to do so) (R. 718; Pl. Ex. 13, 14) and used them to pay off the Canadian bank loans (Pl. Ex. 31, 32, 33, 28, 29, 30, 34; R. 533-534; Exs. A-17, A-18) in December, 1952, and January, 1953; also to pay life insurance premiums on his life insurance, and to assist his wife in a small way in making an investment in real estate in Vancouver (R. 534, 523; Exs. A-23, A-24). [This real estate did not belong to Max T. Edwards (R. 621) except for a \$5,000 equity (R. 621). He executed a \$10,000 guaranty in that connection (R. 604, 621; Exs. A-19, A-20, A-21)]. After the completion of this program, Edwards Shaver Departments, Incorporated, was still indebted to Max T. Edwards (R. 614). This would have been even greater if loan interest had been charged or salary charged (R. 292-294). In addition, the Canadian companies, Edwards, Ltd., and Lewis Cutlery, Ltd., had been doing business with the Washington corporation over a period of years on a contra account basis and were owed \$5,000

in the case of Edwards, Ltd. (R. 699) (Max T. Edwards estimated) (R. 529) and \$2,029.25 in the case of Lewis Cutlery, Ltd., as of January 31, 1953 (R. 528).

The handling of these finances did not involve an interruption in the continuance of the business of the Washington-California corporations. On the contrary, in January and February of 1953, payments were made to various creditors (R. 349, 350; Ex. A-3; R. 347, 348, 735-737), additional merchandise was purchased (R. 738), and Max T. Edwards (who alone handled the finances) (R. 783) continued to lend money to the corporations; *e.g.*, a loan of \$2,000 on February 9, 1953 (R. 735, 132), and \$1,000 on February 13, 1953 (R. 772). During December, 1952, and January, 1953, no creditor had contacted Max T. Edwards about payment of its account (R. 507, 547).

C. Events Preceding Receivership

However, the financial condition of the companies had worsened in 1952 over what it had been in 1951 (R. 312, 313) even if we exclude from consideration the valuable concession contracts, goodwill and experience (R. 554, 693-694). The Seattle store was losing money and an effort to sell it in September, 1952, had proved fruitless (R. 477-478). Max T. Edwards had instructed Gilbert Edwards to close the Seattle store as soon as possible after the Christmas season (R. 477-478). However, the concessions were operating and were profitable (R. 278, 284-288, 313-316, 331, 686-687). About February 10, 1953, Max T. Edwards and his British Columbia attorney, Mr. Sharp, discussed informally with creditors the matter of the payment of accounts

(R. 680). It was evident that additional time would be needed to meet the claims of creditors and so, on February 17, 1953, a letter formulated by Attorney Sharp was sent out to creditors requesting additional time (R. 632-633, 657-658; Ex. A-33). Before that letter was received by the Hall Company, a representative of that company came to Seattle about February 26, 1953, to discuss the payment of the Hall Company account (R. 631). He was quite cooperative and friendly (R. 660). As a result of this discussion, a meeting of creditors was arranged for February 27, 1953 (R. 508, 509) to discuss the payment of the accounts owing. At this meeting, various suggestions were made as to how creditors should be paid (R. 543, 663). Attorney Sharp suggested making a settlement of 25% on the dollar (R. 539). Mr. Burch suggested that additional advances be obtained from the department stores to pay creditors (R. 243, 244-245). The meeting was friendly (R. 325, 326, 511). No threats of action were made by any creditor (R. 540, 660). No suggestion of bankruptcy was made (R. 511, 734). Indeed, at that meeting, Max T. Edwards, together with Gilbert Edwards, offered to continue without salary so as to permit the full payment of creditors from the proceeds of the business (R. 540-541, 684, 539). There was no suggestion by anyone at or prior to the February 27 meeting that operations be terminated. No threats of legal action were brought to the attention of Attorney Sharp (R. 679, 696) and he had not been consulted by either of the Edwards with reference to the possibility of bankruptcy or of threats of legal action (R. 668, 679, 734). There was some discussion at the February 27 meeting as to whether a creditor known as

Horne & Cox could be persuaded to hold off any action to collect its account (R. 267, 326). The Hall Co. representative thought he could hold Horne & Cox in line (R. 267, 326). At that meeting, Mr. Ester, the company accountant, was asked to prepare a financial statement showing the condition of the business as of the end of 1952 and a second meeting was to be held after that report was prepared.

D. State Court Receivership and Bankruptcy

However, on February 27, 1953, suit was instituted by an assignee of Horne & Cox against the California corporation (Pl. Ex. 22, Ex. A-26) and its property was attached (R. 514, 515; Ex. A-26). Max T. Edwards considered this as a "bolt out of the blue" (R. 517, 544, 548, 549, 662). Accordingly, when the second meeting of creditors was held on March 9 (R. 274, 288, 327-328, 329, 334), the creditors' attitude had changed (R. 328); they were concerned and refused to make an arrangement to continue with the operation of the corporation (R. 522, 524, 665) which Max T. Edwards wished to continue (R. 667). The attachment caused the concession agreements in California to be cancelled according to concession contract (R. 518-519, 521; Exs. A-1, A-27). Suit was brought against the Washington corporation and State Court Receiver appointed on March 11, 1953 (R. 98, 168, 249, 351). He took possession of the corporate books and records of Washington and California corporations (R. 298, 613, 731; Pl. Ex. 24). An involuntary Petition in Bankruptcy was filed against the Washington corporation on May 7, 1953 (R. 168), and the corporation was adjudicated bankrupt May 25, 1953

(R. 168). Meanwhile, involuntary bankruptcy proceedings against the California corporation (R. 273, 168) (Receiver appointed March 27, 1953) (R. 98), were dismissed on condition that the assets of the California corporation be administered as part of the bankrupt estate in Seattle, Washington. This was done (R. 98, 168-169).

Subsequently, the Receiver of the Washington corporation sold the assets in the Bon Marche concession at sale (R. 587) and the assets were purchased by Shaver aids, Inc. (although the corporation had not been designed for that purpose) (R. 688) for reasons of economy, the corporation being organized and available (R. 688). Shaver aids, Inc., attempted to purchase concession assets in California, but without success (R. 588). The funds that would have made such purchase possible were to have come from the proceeds of a loan that Bert Edwards made or was prepared to make (R. 650-651). Max T. Edwards was not a stockholder in Shaver aids, Inc., or financially interested in the Seattle concession (R. 170-171).

E. Cooperation Subsequent to Appointment of Receiver

Following the appointment of the Receiver, Gilbert Edwards cooperated fully (R. 374). There was no claim by the government that there had been any concealment at any time from the Receiver by either Gilbert or Max T. Edwards (R. 169). The Receiver received information about the affairs of the corporation from Max T. Edwards (R. 351). Gilbert Edwards was examined before the Referee by the Trustee in Bankruptcy and by his attorney, and answered all questions put to him

concerning the affairs and property of the company (R. 732). At no time did either the Receiver or the Trustee in Bankruptcy contact Max T. Edwards or make any request or demands upon him (R. 552-553, 605, 619-620). Later (April, 1954) (R. 619), a suit was instituted against Max T. Edwards and others in Vancouver, B.C., and that suit was settled by the payment of \$10,000 to the Trustee (R. 616-618; Ex. A-29, 10-22-56). A release was executed (Ex. A-29). Subsequent to the settlement, warrants for the arrest of the defendants were issued (R. 16-17).

F. Financial Records of Bankrupt Corporation

A principal witness for the government was Edward R. Ester, certified public accountant, an accountant for the Washington and California corporations involved since 1946 (R. 284). It was Mr. Ester who not only supervised the keeping of the books and records for the corporations involved and supplied data for creditors but who was also employed by the Receiver and later by the Trustee in Bankruptcy. The government also used as a witness and relied upon the testimony of Bernice E. Flynn. Bernice E. Flynn commenced employment for the Washington corporation in August, 1952 (R. 429, 421) and continued in the employment for a period of two weeks following the appointment of the Receiver (R. 425). Miss Flynn kept the book-keeping records (R. 420, 424, 426-427). She testified that nothing happened to the records of the Washington corporation while she was there and there was no change in the manner of keeping these records (R. 426-428).

Corporate books of account including records of original entry were kept at all times (R. 277, 147, 427, 140), as well as daily sales reports (Pl. Ex. 47). However, transactions between the Washington and Canadian corporations were always recorded in books kept in Vancouver (R. 433-434), not in Washington (R. 281). It was Mr. Ester's practice to make adjusting entries at the end of the year (R. 282), the last such entry made being in 1951 (R. 282). He hadn't made them for 1952 because, as he testified, this was not due to any request or intervention on the part of the Edwards, but rather because he, the accountant, hadn't gotten around to it (R. 282).

Likewise, the postings from the books of original entry had not been made since June, 1952, for the same reason (R. 282). However, the books of original entry did contain the record concerning the state of Max T. Edwards' account with the corporation (R. 155). This account showed advances made by Max T. Edwards to the corporation and the repayment of such advances (R. 155). Also shown were the loan of Gilbert Edwards of \$1,800 to the Washington corporation on August 5, 1952 (R. 307, 308, 347, 348) and the \$2,000 paid to Gilbert Edwards (R. 170-172; Pl. Ex. 12, 35).

The same records showed the state of business of the concessions (R. 315-316) and the department store advances (Pl. Ex. 17—Macy's \$5,000; Pl. Ex. 20—Weinstock-Lubin, \$5,000; Pl. Ex. 21—Broadway Department Store, \$15,000) (Pl. Ex. 21).

Among the records of the corporation turned over to the State Court Receiver were the following:

(a) Checks involved in the withdrawals by Max T.

Edwards (Pl. Ex. 8, 9, 10, 13, 14); (b) Books of original entry showing the state of Max T. Edwards' account, with withdrawals being charged to him (R. 155); (c) Accounts payable ledger (Pl. Ex. 2); (d) Accounts payable statement (Pl. Ex. 1) showing the status of accounts payable on various dates; (e) The statement of the condition of the business exhibited to creditors at the February 27, 1953, meeting (Pl. Ex. 3) (R. 322, 334) (Mr. Cosby, later State Court Receiver, was present, R. 323); (f) Ex. A-8 made at the creditors' request and submitted at the March 9th meeting (R. 325-327); (g) Ex. A-3 (St. 1-31-53) submitted to creditors at February 27, 1953, meeting (R. 323-324); (h) Check showing the ownership of the cash register by the Washington corporation (Pl. Ex. 6); (i) Records of departmental business (R. 314-315); (j) Record of Gilbert Edwards' loan of \$1,800 (R. 347-348); (k) Ledger sheets (Pl. Ex. 39); and (l) Daily sales reports for 1952 (Pl. Ex. 47).

The Receiver testified that he was able to ascertain the status of the business as of 12-31-52 (R. 302-303). On that basis he knew, or could have ascertained, that at the end of 1952 after the advances and withdrawals were balanced, the Washington corporation was indebted to Max T. Edwards in the sum of \$2,756.38 (R. 121, 298). It was also possible to ascertain from those records that the company was indebted to Max T. Edwards on January 12, 1953, in the sum of \$2,000, \$300 on January 15, 1953, and \$3,000 on January 21, 1953, subject to amounts owing by him for an unpaid stock subscription and a Cadillac car. The amount owed by him would have been \$2,543.62, and this, Max T. Edwards repaid the corporation (R. 122).

It is true that there was no book record showing the transfer of the cash register and the delivery of the adding machine. This, however, was too soon before the onslaught of the receivership. However, these matters could have been inquired into by the Receiver and the Trustee. Mr. Ester testified that Max T. Edwards gave the Receiver information relative to corporate affairs (R. 351), and that the Receiver explained the books and records to the Trustee in Bankruptcy (R. 355).

There was no showing that the records were incorrect or otherwise incomplete, but merely that Mr. Ester had not gotten around to posting the transactions to the ledger from the books of original entry (R. 282). He also was employed by the Receiver to make postings to the ledger and there was no showing that he failed to do so. There was no showing that either of the defendants had not truthfully answered all questions, or that they had refused to answer creditors, or that the creditors were not fully aware of all facts connected with any of the items which are the subject of the various counts of the Indictment.

G. The Transfer of the Cash Register and the Delivery of the Adding Machine

The Washington corporation owned a cash register (R. 127-128; Pl. Ex. 6, 27; R. 380-381, 421). About February 17, 1953, in connection with the previously authorized (R. 477-478) closing or dismantling (R. 727, 760) operations [because the Seattle store, being unprofitable (R. 286-287, 338) was to be closed (R. 324, 329, 334, 477-478, 529-530) and its business was tapering down (R. 609)], Gilbert Edwards arranged to ship

the cash register and other items to Edwards, Ltd. (R. 757-758). Accordingly, an invoice showing this transaction was made out February 20, 1953 (R. 764). This invoice was a preliminary requirement of the shipment (R. 230). The cash register and other items were originally released by the Customs Service on March 2 or 3, 1953, and then returned for some reason (R. 229) and then again released to Bekins Transfer (R. 228) about March 9, 1953 (R. 229). Thus, the cash register was gone before the State Court Receiver was appointed, a rented one being substituted (R. 422). The transfer of the cash register was for the sum of \$126 charged to Edwards, Ltd. (R. 726, 766). Reference to Ex. A-34 shows notation that the amount was taken off the account between two stores and paid (R. 722, 726).

The cash register was ultimately delivered to the Lewis Cutlery, Ltd. store in Vancouver, B.C. (R. 765, 529-530). That company needed the cash register (R. 530) to replace an older unsatisfactory type (R. 728); in fact, it could have used it sooner (R. 763) and Gilbert Edwards was late in sending it up (R. 763). He had been instructed to close the Seattle store as soon as possible after the Christmas business (R. 477-478). About the same time, as part of the dismantling operations, other items were shipped to California (R. 760-762). The adding machine, owned by the corporation (R. 127), which was a portable machine, inadvertantly referred to as a cash register, was delivered by Gilbert Edwards [who used it at the store (R. 531) and at his home, too (R. 729-730)] to Max T. Edwards (R. 758, 531, 533) for his use in his travels for the business (R. 533, 630-631) in January or February 1953 (R. 530-531) prior to the appoint-

ment of the State Court Receiver. Accordingly, it never came into the Receiver's possession (R. 422) and never came into the possession of the Trustee who was appointed after the filing of the involuntary petition on May 7, 1953. Miss Flynn testified (contrary to another government witness, R. 356) that no adding machine was replaced in the Seattle store, apparently because not needed (R. 423, 608). No demand for possession of said items was ever made by the Trustee or Receiver (R. 605).

H. Elements of Offenses Charged But Not Proved

These will be referred to in Argument. We would like to point out, however, that we have not found in the Record any reference to the date upon which the Trustee in Bankruptcy was appointed and qualified. May 7, 1953, is the date upon which the petition in involuntary bankruptcy was filed.

SPECIFICATION OF ERRORS

Specification of Error No. 1

The District Court prejudicially erred in overruling appellants' respective motions for dismissal and judgment of acquittal of each and every count respectively of the Indictment against each defendant, the evidence being insufficient as a matter of law to support the allegations of the respective counts. With respect to the defendant, Max T. Edwards, the venue laid was not proved. The judgment should be reversed with directions to enter judgment of acquittal.

Specification of Error No. 2

The District Court prejudicially erred in denying ap-

pellants' respective Motions for Judgment of Acquittal filed March 19, 1958 (pursuant to Rule 29 of the Federal Rules of Criminal Procedure) with respect to the counts and each of them as to which the respective defendants were found guilty. The judgment should be reversed with directions to enter judgment of acquittal.

Specification of Error No. 3

The District Court prejudicially erred in entering judgment of guilty against appellants, and each of them, and in imposing a sentence on the counts as to which there was no evidence sufficient to go to the jury. The judgment should be reversed with directions to enter judgment of acquittal.

Specification of Error No. 4

The District Court prejudicially erred in submitting to the jury counts of the Indictment on which the evidence was not sufficient, assuming *arguendo* that the evidence was sufficient as to other count or counts of such Indictment. The judgment should be reversed and a new trial ordered.

Specification of Error No. 5

The District Court prejudicially erred in overruling objections interposed on behalf of the appellants and each of them to evidence adduced on behalf of the government in admitting plaintiff's Ex. 24 (R. 353).

Specification of Error No. 6

The District Court prejudicially erred in overruling objections interposed on behalf of the appellants and each of them to evidence adduced on behalf of the government in admitting plaintiff's Ex. 12 (R. 149).

Specification of Error No. 7

The District Court prejudicially erred in overruling objections interposed on behalf of the appellants and each of them to evidence adduced on behalf of the government in permitting the government's witness, Benjamin Kendall Cosby, State Court Receiver, to testify concerning the sale of assets of Edwards Shaver Departments, Incorporated (the bankrupt corporation) to Shaver Raids, Inc., owned by Gilbert Edwards. The proceedings were as follows:

"Q. Mr. Cosby, did you as receiver sell any of the assets of the insolvent corporation?

A. Yes, sir.

Q. More specifically did you sell the —." (R. 361)

MR. MORRISON: It is my anticipation, Your Honor, that he will inquire as to the fact of the purchase of some of the assets from the bankruptcy—
* * * purchase of some of the assets from the state receiver by Mr. Gilbert Edwards through the corporation Shaver Raids, Inc.

* * *

It is my point that this was entirely a solicited bid by the receiver who inquired around from various other sources as to where he could best dispose of the merchandise and that it was in all respects an entirely legal and bona fide action, picking up the pieces that resulted from this bankruptcy.

On that basis I think it's not material, it having occurred substantially after the event, and it may have a prejudicial effect outweighing any probative value it has in view of the nature of the transaction. I anticipate that that is what he's attempting to develop, and on that ground I object." (R. 363)

* * *

Government counsel then stated what he proposed to show. * * *

“THE COURT: The Court thinks upon your bringing that evidence before the Court during the trial that the objections thereupon would be not well taken * * * ”. (R. 366)

* * *

Mr. Cosby was then permitted to testify as to the public sale of assets of the bankrupt corporation consisting of the downtown Seattle Bon Marche concession to Shaver raids, Inc., and as to the sale being negotiated by Gilbert Edwards on behalf of the purchaser (R. 368-371).

Specification of Error No. 8

The District Court prejudicially erred in overruling objections interposed on behalf of the appellants and each of them to evidence introduced on behalf of the government, in permitting government witnesses to testify concerning the amount received by general creditors, percentagewise, from either the State Court Receiver or the Federal Court Trustee in Bankruptcy, or both of them. The proceedings were as follows (R. 249-250):

The witness, Clifton Burch, testified as follows:

“Q. Do you know how much the general creditors received percentagewise from either the state court receiver, the Federal Court trustee in bankruptcy, or both of them?

MR. MORRISON: Your Honor, the only purpose of this is apparently to incite some feeling against these defendants and we're not responsible for the method of administration of the bankruptcy proceedings, and I think it has no materiality whatsoever on any issue in this case, and I don't think that

going into the bankruptcy proceedings or what the creditors might have gotten as a result of whatever administration expenses and fees were involved in the bankruptcy proceeding has anything to do with these people, certainly not an intent that was supposed to have been conceived quite a few months before, or years, as it turned out.

THE COURT: The objection is overruled. You may answer.

A. We received approximately — well, we received \$6,700 out of a \$40,000 claim.”

* * *

The witness Edward R. Ester testified as follows (R. 99-100):

“Q. How much did you have as a claim against the bankrupt estate?

MR. MORRISON: Objection, Your Honor. I don't know that that is material.

THE COURT: The objection is overruled.

A. It was roughly eleven hundred dollars. I don't have the exact figure.

Q. (By MR. McKINNON) How much was paid to general creditors percentagewise, to the best of your recollection?

MR. MORRISON: Now I object to that, Your Honor, as being completely irrelevant and immaterial to any issue in this case as to how the bankruptcy proceeding was administered.

THE COURT: What is the purpose of it, to evidence what issue?

MR. McKINNON: The intent of the defendants in making the transfers alleged.

* * *

THE COURT: For that limited purpose the objection is overruled, and the—

* * *

THE COURT: The objection is overruled and the witness may answer.

A. It was less than twenty per cent. I don't have the exact percentage. I believe it was around eighteen." (R. 99-100)

Specification of Error No. 9

The District Court prejudicially erred in sustaining the government's objections to admission of Deft. Ex. A-22 (R. 501). The proceedings were as follows:

Beginning at R. 495 the witness testified to accounting data, referring to a schedule which upon request of government counsel was marked for identification as Ex. A-22 (R. 496).

The following proceedings then occurred (R. 500-502):

"THE COURT: Are you reading from this schedule, A-22?

* * *

MR. MORRISON: * * * He is testifying from records which are in evidence. He is referring to the schedule merely to facilitate the testimony where we have made the reference [484] available.

MR. MCKINNON: I certainly object to the admission of any such schedule as this, Your Honor.

THE COURT: The objection is sustained and I think you better not use that for the purpose mentioned.

* * *

MR. MORRISON: If the Court please, we believe it is admissible on two grounds, the preparation of schedules to show transactions and disbursements in a case of this kind has been approved by the courts, and secondly to expedite this proceeding and assist the witness in accurately stating the tracing

of funds involved in this indictment a schedule is almost essential and that's why it was prepared.

THE COURT: Summaries by accountants or by parties who are witnesses are not as a matter of right admissible. There is no evidence as to when this document came into being, whether it was made along with the transactions in order to keep track of the transactions at the time or when it was made, or whether it was one purely made in contemplation of this trial for the [485] witness' convenience or whether it was something made at the time of the business transactions reflected by it.

MR. MORRISON: I will state it was made in preparation for this trial for the witness' and the jury's convenience to show the distribution directly based on evidence which has been submitted of the funds involved in this indictment.

THE COURT: The court has no right, I do not believe, to admit it over objection.

MR. MORRISON: I can submit authority to the court where the admission of such exhibits has been approved.

THE COURT: The Court sustains the objection. You may proceed.

(Defendants' Exhibit No. A-22 for identification was refused.)

* * *

THE COURT: I do not hear a stipulation. You may proceed. The court does not admit it."

Specification of Error No. 10

The District Court prejudicially erred in denying appellants' respective motions for new trial filed March 19, 1958, pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure, such denial constituting an abuse of discretion.

SUMMARY OF ARGUMENT

1. Each appellant is entitled to separate consideration on each count of the indictment of which complaint is here made.

2. In connection with Specifications of Error 1, 2 and 3, there was a failure to prove one or more of the essential elements of the offenses charged as to each count on which the defendants were found guilty, thus requiring the reversal of the judgment of conviction with directions to enter a judgment of acquittal. In connection with this point, the government failed to prove that the defendants or either of them had possession or control of the items of money or property described in the various counts of the indictment at the time of the appointment of the Trustee; failed to prove that there was a knowing and fraudulent withholding of information from the Trustee or creditors concerning the items of money or property involved; with respect to count XIX involving the transfer of a cash register, the government also failed to prove that the transfer was "in contemplation of a bankruptcy proceeding" and "with intent to defeat the bankruptcy law"; that with respect to Max T. Edwards, the evidence was also insufficient in failing to prove that the offenses charged took place in Seattle, Washington (See also Br. p. 57, 60, *infra*).

3. The District Court prejudicially erred (Spec. Err. 4) in submitting to the jury counts of the indictment on which the evidence was not sufficient, assuming *arguendo* that the evidence was sufficient as to other count or counts of the indictment. By this submission, the jury was adversely affected in its consideration of the counts involved. Had counts as to which the evidence was in-

sufficient been dismissed, much evidence would have been withdrawn from the jury's consideration, the issues would have been simplified, and the jury could have considered the remaining count or counts without the prejudice attendant upon the admission of immaterial evidence under simplified instructions of the court. Accordingly, the judgment should be reversed and a new trial ordered.

4. The District Court prejudicially erred in overruling objections interposed on behalf of the appellants and each of them to evidence adduced on behalf of the government with respect to (a) (Spec. Err. 5) in admitting Plaintiff's Exhibit 24 (Br. p. 65, *infra*); (2) (Spec. Err. 6) in admitting Plaintiff's Exhibit 12 (Br. p. 66, *infra*); (c) (Spec. Err. 7) in permitting a government witness to testify concerning the sale of bankrupt assets to Shaveroids, Inc. (Br. p. 68, *infra*); and (d) (Spec. Err. 8) in permitting government witnesses to testify to the percentage received by creditors (Br. p. 69, *infra*). The evidence was immaterial and prejudicial.

5. The District Court prejudicially erred (Spec. Err. 9) in sustaining the government's objections to the admission of Defendants' Exhibit A-22 constituting a summary of accounting testimony (See Br. p. 70, *infra*). The evidence was highly material.

6. The District Court prejudicially erred (Spec. Err. 10) in denying appellant's respective motions for a new trial. The jury had an involved case to consider under a twenty-one count indictment under inadequate instructions, the inadequacy being as to vital matters. As a result, the jury apparently did not properly understand

the case. The denial of a new trial was therefore an abuse of discretion (See Br. p. 72, *infra*).

The foregoing points are set forth under appropriate headings in the index, to which the court is respectfully referred.

ARGUMENT

Specifications of Error Nos. 1, 2, 3, and 10

I.

There Was a Failure to Prove One or More of the Essential Elements of the Offenses Charged as to Each Count on Which the Defendants Were Found Guilty. Judgment of Conviction Should Be Reversed with Directions to Enter a Judgment of Acquittal.

A. Statement of proceedings below on error claimed

Appellants challenged the sufficiency of the evidence at the close of the government's case (R. 437-440) and renewed the challenge at the end of the entire case (R. 783). In conformity with Rule 29, F.R.C.P., appellants interposed a Motion for Judgment of Acquittal (R. 33, 35). Each of these the District Court overruled (See Br. p. 2, ft. 2). The action of the District Court is assigned as error.

B. Preliminary principles

At the outset we deem it helpful to call attention to the following preliminary principles:

1. The error assigned is reviewable. *Lelles v. U. S.* (9 Cir.) 241 F.2d 21; *Anderson v. U.S.* (9 Cir.) 253 F.2d 419.

2. Every element of the offense charged must be proved, else the defendant is entitled to be acquitted.

Politano v. U. S. (10 Cir.) 220 F.2d 217.

3. Each defendant is entitled to separate consideration on each count.

Kotteakos v. U. S., 328 U.S. 750, 90 L.ed. 1557, 66 S.Ct. 1239.

4. Scintilla evidence is not enough. Substantial evidence of guilt is required.

Curley v. U. S. (D.C. Cir.) 160 F.2d 229;

U. S. v. Yeoman-Henderson, Inc. (7 Cir.) 193 F.2d 867, 869.

5. In determining the sufficiency of circumstantial evidence, acquittal must be ordered if the jury must find as reasonable men that the evidence is insufficient. Thus, if the jury must have a reasonable doubt of guilt, the court should grant the motion for acquittal.

Karn v. U. S. (9 Cir.) 158 F.2d 568;

Curley v. U. S. (D.C. Cir.) 160 F.2d 229;

Elwert v. U. S. (9 Cir.) 231 F.2d 928, p. 933.

6. The entire record is considered.

T'Kach v. U. S. (5 Cir.) 242 F.2d 937.

7. Defendants' evidence may be considered in determining whether the government's circumstantial evidence is consistent with the defendants' innocence. In *U. S. v. Gasomiser* (D. Del.) 7 F.R.D. 712, the court said at p. 721:

"It should be made clear, however, that while all the government's evidence is accepted as true, the court may very well look to the defense evidence for the purpose of ascertaining a reasonable hypothesis other than guilt. In many cases, a motion for judgment of acquittal made at the close of the government's case will be denied because there is no apparent reasonable hypothesis from the circumstances other than that of guilt. Indeed,

in most cases any hypothesis other than guilt can only be shown in defense. The government usually is interested solely in presenting its own case, and inferences other than guilt can only be shown by facts at variance with the hypothesis of the government itself. If the rule that 'unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused' has merit, then the rule must be invoked at a time where it may have value. After the defense evidence has been presented, therefore, such a motion may be granted for the reason that the defense evidence has presented a reasonable hypothesis other than guilt which may be inferred from all of the government's evidence."

Accordingly, defendants' evidence will be relied upon—not to enable the court to weigh conflicting evidence—but rather to show that the government's circumstantial evidence relied on to show the elements of "knowing and fraudulent," "contemplation of bankruptcy," and "intent to defeat the bankruptcy laws" did *not* negative the innocent character of such circumstantial evidence because of the possible and probable character of such innocence as shown by the defendants' evidence as to what actually transpired. Such a showing will be made to support the defendants' contention that the government failed to establish evidence of guilt, and judgment of acquittal should now be ordered.

State v. Buckingham, Del., 134 A.2d 568.

8. Any error affecting substantial rights is not to be disregarded unless it affirmatively appears from the entire record that it was not prejudicial.

McCandless v. U. S., 298 U.S. 342, 80 L.ed. 1205, 56 S.Ct. 764;

Kotteakos v. U. S., 328 U.S. 750, 90 L.ed. 1557, 66 S.Ct. 1239.

9. Erroneously admitted or excluded evidence which might have operated to the substantial injury of the defendant constitutes reversible error. *Wolcher v. U. S.* (9 Cir.) 200 F.2d 493. This is true even though the evidence is immaterial, if it was otherwise detrimental or prejudicial. *Beyer v. U. S.* (3 Cir.) 282 Fed. 225. This is especially true in a close case. *Templeton v. U. S.* (6 Cir.) 151 F.2d 706.

10. Cases involving concealment under 11 U.S.C.A. §32(c) dealing with grounds for objecting to discharges in bankruptcy, although involving civil rather than criminal liability, will be cited to cast light on the meaning of the phrase in the penal statute, 18 U.S.C.A. §152 "knowingly and fraudulently conceals." Because we have a penal statute here, the rule of strict construction applies (*Field v. U. S.* (8 Cir.) 137 Fed. 6) and it will be recalled that the requirement with respect to this penal statute is that proof of violation must be beyond a reasonable doubt.

C. There was a failure to prove that defendants, or either of them, had possession or control of the items of money or property described in the various counts of the Indictment at the time of the filing of the involuntary petition in bankruptcy, or at the time of the appointment of the Trustee, or thereafter.

1. Facts as to the so-called "concealment" counts, namely, Counts III, VI, IX, XII, XV, XVIII, XX and XXI.

The circumstances surrounding the counts involved

were quite similar. Count III is typical. It charged that the defendants knowingly and fraudulently concealed on and after May 7, 1953, at Seattle from the Trustee and from creditors in a bankruptcy proceeding, property belonging to the estate of the bankrupt, to-wit, \$4,000. The following is a summary of the amounts and exhibits and dates involved:

Count III, \$4,000 (Ex. 8) dated 12-15-52 (R. 138).

Count VI, \$15,000 (Ex. 9) dated 12-30-52 (R. 139-140).

Count IX, \$5,000 (Ex. 10) dated 12-30-52 (R. 142).

Count XII, \$7,500 (Exs. 30 and 34) dated 12-30-52 (R. 152).

Count XV, \$2,000 (Ex. 14) dated 1-12-53 (R. 151).

Count XVIII, \$3,000 (Ex. 13) dated 1-22-53 (R. 150).

Count XX, cash register (About February 17, 1953. See Br. p. 16, *supra*).

Count XXI, involving Gilbert Edwards only, adding machine (In February, 1953. See Br. p. 45, 61 *infra*).

The evidence concerning the circumstances under which the sums were withdrawn is summarized at Brief, page 7, *supra*.

One element was common to each of these counts. The government failed to prove that the items involved were in the possession of the defendants at the time of the filing of the involuntary petition in bankruptcy, May 7, 1953, or at the time of the appointment and qualification of the Trustee in Bankruptcy there being no evidence as to when this took place, or thereafter. Indeed, the evidence affirmatively showed that the moneys, which are the subject matter of Counts III,

VI, IX, XII, XV, and XVIII, had been disbursed by Edwards Shaver Departments, Inc., on or about the dates above described (the last disbursement being January 22, 1953) in payment of sums owing to Max T. Edwards, his account being charged therewith (R. 41, 42). He, in turn, used the sums to repay loans made by him from Canadian Banks who had called the loans, to pay insurance premiums and to assist his wife in connection with a real estate investment (Br. p. 8, *supra*). The evidence also showed that even after the payment of these funds the company was still indebted to Max T. Edwards (R. 614). The evidence further showed that Max T. Edwards continued to lend money to the corporation as late as February 13, 1953 (R. 772), and the government's evidence showed that any sums paid out to him in excess of his indebtedness were repaid (R. 122, 298-299). Clearly then, as to the sums of money involved, there could be no concealment or secreting. They merely constituted the repayment of a debt owing to a creditor. (The jury found neither conspiracy nor fraudulent transfer involved in these payments because they found the defendants not guilty on the counts which so charged; namely, Counts I, II, IV, V, VIII, X, XI, XIII, XIV, XVI and XVII).

It was, therefore, evident that the moneys so paid to Max T. Edwards had ceased being the property of the corporation from the time of payment and could not possibly, therefore, constitute property of the corporation concealed from the Trustee or the creditors.

2. *The facts as to Count XX with respect to possession or control of the cash register.*

The cash register, which Count XX charged the defendants with concealing as "property belonging to

the estate of * * * Edwards Shaver Departments, Incorporated" was likewise no longer in the custody or legal control of either defendant. The evidence heretofore reviewed (Br. p. 16-18, *supra*) showed that the cash register was shipped to Edwards, Ltd., Vancouver, B. C., about February 20, 1953 (R. 765-766, 232-233). This was prior to the appointment of the State Court Receiver on March 11, 1953 (R. 422). The transfer was pursuant to an earlier plan to close the Seattle store and Gilbert Edwards was late in getting around to the transfer (R. 761, 765). Edwards, Ltd., was charged \$126 for this transfer (R. 726, 766, 772; Ex. A-34). This meant that title to the cash register had passed to Edwards, Ltd., on or shortly after February 20, 1953, and prior to the appointment of the State Court Receiver. It could not, therefore, possibly be property of the bankrupt corporation on May 7, 1953, or thereafter, because title had passed on or about February 20, 1953.

This case, therefore, is not one in which either the bankrupt corporation or the defendants, or either of them, retain a secret interest in the property so that in truth and in fact the property belongs to the estate of the bankrupt, and, therefore, the concealment of the estate's interest violates the statute.

In re Perkins (D.N.J.) 40 F.Supp. 114;

In re Neiderheiser (8 Cir.) 45 F.2d 489.

This is all the more true in the absence of a showing that the creditors or Trustee in Bankruptcy were ignorant of the facts (See Br. p. 12-16, *supra*). This principle that there is no concealment has been applied where the bankrupt has made full disclosure of the facts.

In re Doody (7 Cir.) 92 F.2d 653;

In re Hennebry (N.D. Iowa) 207 Fed. 882.

Certainly, if the defendants in good faith transferred the cash register believing that title thereto was transferred to Edwards, Ltd., such a transfer could not be the subject of "fraudulent concealment."

In re Wakefield (N.D. N.Y.) 207 Fed. 180.

It is true that Max T. Edwards testified that he still had the cash register on May 7, 1953, and that he would have given it to Gilbert Edwards if the latter had asked for it on or after May 7, 1953 (R. 533). Gilbert Edwards also testified the cash register was available in Vancouver, B. C., on May 7, 1953 (R. 741).⁴ However, what Max T. Edwards meant is obvious. The record shows that since about February 20, 1953, Edwards, Ltd., the Canadian corporation, was the owner of the cash register, its account having been charged therefor and to whom possession had been delivered (Br. p. 16, *supra*). As the testimony shows, Max T. Edwards did not mean to repudiate the legal custody, possession and control of the cash register by its owner, Edwards, Ltd., the Canadian corporation. All that Max T. Edwards obviously meant was that he had the control of the cash register *on behalf of Edwards, Ltd.*, not a control either on his own behalf individually or on behalf of Edwards Shaver Departments, Inc. Nothing in Gilbert Edwards' testimony is to the contrary.

Edwards, Ltd., a Canadian corporation, was a legal entity, separate from Max T. Edwards, its sole stock-

⁴There was no such testimony as to the time of the appointment and qualification of the Trustee there being no evidence as to when the Trustee was appointed and qualified. May 7, 1953, is the date of the filing of the involuntary petition (R. 168).

holder, and likewise separate from Edwards Shaver Departments, Incorporated, the bankrupt corporation involved. The separate entity of the Canadian corporation cannot be disregarded.

In re Fox West Coast Theatres (9 Cir.) 88 F.2d 212, p. 227;

Burnet v. Commonwealth Improvement Co., 287 U.S. 415, 77 L.ed. 399, 53 S.Ct. 198, 199.

Accordingly, Edwards, Ltd., had life, property, creditors, title, and possessory rights and remedies of its own.

See

Proprietors of Jeffries Neck Pasture v. Inhabitants of Ipswich, 153 Mass. 42, 26 N.E. 239, 240.

The title, possession or control of Edwards, Ltd., was not that of Max T. Edwards, but was independent thereof. Corporate rights are not stockholder rights. Such rights cannot be ignored even in bankruptcy proceedings. See

Wheeler v. Smith (9 Cir.) 30 F.2d 59;

Finn v. George T. Mickle Lumber Co. (9 Cir.) 41 F.2d 676;

New York Credit Men's Association v. Manufacturers Discount Corporation (2 Cir.) 147 F.2d 885, 887,

and cases *supra*. The control, which Max T. Edwards testified he had of the cash register, was control on behalf of Edwards, Ltd., as *its* agent, not on his own behalf or on behalf of the bankrupt corporation. Such control is not the kind of possession or control that con-

stitutes "property of" the bankrupt corporation. It is rather the property of Edwards, Ltd., the Canadian corporation. This distinction is pointed out in Restatement, Torts, Sec. 216, defining what is meant by possession of a chattel. Assuming at best that Max T. Edwards had physical custody of the cash register, the possession and control of the cash register was, nevertheless, in Edwards, Ltd., the owner. See *State v. Canyon Lumber Corp.*, 46 Wn.2d 701, 710, 284 P.2d 316, 322; *Henley v. State*, 59 Ga. 595, 2 S.E.2d 139.

In the *Canyon Lumber Corporation* case, the court said:

" * * * it is the theory of the law that all property is in the possession of its owner, either in person or by agent. *Windsor v. McVeigh*, 93 U.S. 274, 23 L.ed. 914; *Portland & Seattle Railway Co. v. Ladd*, 47 Wash. 88, 91 P. 573."

The testimony of the Edwards, in light of the record, does not destroy the fact that legal possession and control of the cash register was in the Canadian corporation and the testimony does not create a jury question. In an analogous case, *Elenkrieg v. Siebrecht*, 238 N.Y. 254, 144 N.E. 519, one Siebrecht, his wife and daughter owned all the stock of a corporation and were officers in charge. In some letters he referred to the corporation's property as his property, and in referring to a possible reduction in rent, he referred to it in terms of "we shall be obliged to reduce his rent." An employee who was injured brought suit against Siebrecht, and the plaintiff relied in part upon the manner in which Siebrecht referred to the property as his. In holding that such testimony was not sufficient to make a jury question on the issue of Siebrecht's personal liability,

and in ordering the case dismissed, the court said at p. 521:

“Merely because Siebrecht referred to the property as his property cannot overcome the undisputed fact of the corporation’s existence and ownership. * * * However this may be, the corporation exists; it has title to the property; it maintains and operates the property through agents. The fact that it is a family corporation, so to speak, is nothing suspicious or illegal. Innumerable are the corporations wherein all the stock is owned by a few members of one family. The fact that one man may own all but a few shares of the stock, and be in fact the dominant and controlling factor or the only active manager of the corporation, is no evidence in and of itself that the corporation does not exist as a person in the eyes of the law actually owning, operating, and controlling property.”

Had the government pursued the question as to whether what Max T. Edwards or Gilbert Edwards meant was individual control by Max T. Edwards as distinguished from control by Edwards, Ltd., the Canadian corporation, the matter would have been brought out in its true light and it would have been apparent that legal possession and control was not in either Max T. Edwards or Gilbert Edwards. Without such control being proved, there was a fatal defect in the government’s case and no concealment was proved (See Br. p. 40, *infra*).

a. *The facts and law as to control as applied to Max T. Edwards.*

As pointed out above, the possession or control to which Max T. Edwards testified was a possession or

control on behalf of the owner, Edwards, Ltd. There was no evidence below that the entity of Edwards, Ltd., should be disregarded. The government's own questions assumed that Edwards, Ltd., and Edwards Shaver Departments, Incorporated, were independent entities, each with its own creditors (R. 756, 765-766). The court's instructions assumed the independent character of the entities (R. 804). No instructions were given on the subject of disregarding the entity of the private corporation.⁵ Max T. Edwards, having neither the required possession nor the required control of the cash register at the time the Trustee was appointed (and, indeed, there being no evidence as to when the Trustee was appointed and qualified), the evidence was fatally deficient in failing to prove that he had the cash register as "property belonging to the estate" of the bankrupt corporation.

b. The facts and law as to control as applied to Gilbert Edwards.

The evidence showed that Gilbert Edwards had neither possession, control, nor physical custody of the cash register since prior to the appointment of the State Court Receiver. He was neither stockholder, officer or employee of the Canadian corporations, and was not a stockholder in Edwards Shaver Departments, Incorporated. His testimony that the cash register was available (R. 533) must also be understood in context of the record. For Gilbert Edwards to have gotten the cash register back, he would have had to ask Edwards, Ltd.,

⁵ The distinction as to the kind of control involved, above discussed, was wholly ignored in the court's instructions (R. 807), a deficiency which undoubtedly constituted a fatal and prejudicial factor in bringing about a verdict of guilty on the counts involved (see Br. p. 72, *infra*).

for it and Edwards, Ltd., had the absolute power to refuse on the ground that it had paid for the cash register and that the cash register belonged to it. See *Sheehan v. Hunter* (8 Cir.) 133 F.2d 303. The claim of Edwards, Ltd., could not be ignored, for example, so as to permit the exercise of summary jurisdiction by the bankruptcy court to require possession to be restored. See *New York Credit Men's Association v. Manufacturers Discount Corp.* (2 Cir.) 147 F.2d 885. Likewise as to Gilbert Edwards there was no evidence as to when the Trustee was appointed and qualified. Thus the government's evidence as to possession and control by Gilbert Edwards was especially deficient. Any possession or control there was, was in Edwards, Ltd., a Canadian corporation.

3. *The facts with respect to Count XXI involving the portable adding machine.*

With respect to the portable adding machine, the uncontradicted evidence is that Gilbert Edwards in February, 1953, delivered the adding machine to Max T. Edwards, president of Edwards Shaver Departments, Inc., so that he might use it as part of his equipment "with a portable typewriter and a camera, dictating machine and other things which I used in my travels" (R. 533, 630-631, 760). There was no receivership or bankruptcy considered or threatened by anyone at the time. The delivery to Max T. Edwards (R. 758) was simply part of the closing operations of the Seattle store (R. 762-763) and Gilbert Edwards never had legal possession, custody or control of the adding machine thereafter (Br. p. 17, *supra*). The government's evidence did not negative this innocent delivery

by Gilbert Edwards and the defendants' evidence established what transpired. If anyone had custody, control or possession, it was either Max T. Edwards as an individual or his Canadian corporation. Neither Max T. Edwards or his Canadian corporation were charged with concealing the portable adding machine from anyone.

- 4. *It is well settled that there can be no concealment of assets belonging to the bankrupt unless the person charged with the concealment has possession or, at the very minimum, actual control of his own over the funds or the property involved when the Trustee is appointed.***

The government failed to prove such possession or control here. Indeed, the government failed to prove when the Trustee was appointed and qualified.

Reiner v. U. S. (9 Cir.) 92 F.2d 823;

Hersh v. U. S. (9 Cir.) 68 F.2d 799;

U. S. v. Camp (D.Haw.) 140 F.Supp. 98;

U. S. v. Schireson (3 Cir.) 116 F.2d 881.

In *Reiner v. U. S.*, *supra*, in holding that there was no concealment from the trustee in bankruptcy because the government had failed to prove possession of the cash involved when the trustee was appointed, the court first reviewed the *Hersh* case, *supra*, at page 824 as follows:

“In *Hersh v. U. S.* (9 Cir.) 68 F.(2d) 799, 804, the defendant was indicted for concealing assets from the trustee in bankruptcy. The court said: ‘The burden of proof was upon the government to show the concealment of the funds alleged in the indictment. In view of the fact that the concealment relied upon consisted in the transfer of

moneys to Klein and Auerbach several months before the trustee qualified, it was essential to show that this concealment continued down to the time the trustee was appointed and thereafter, with intent to deprive the trustee and the creditors of the aforementioned sum.' ”

The court continued at p. 825 as follows :

“The government contends * * * the evidence shows that concealment occurred after the appointment of Lynch as trustee, on July 7, 1936. There is no merit in this contention. It rests upon the assumption that, because the defendant did not, in June, turn over to the receiver all the cash he had obtained in Los Angeles on April 22d, before his departure for Denver, therefore he must have had some left on July 7th, and therefore that amount was concealed on or after July 7th.

“On this the burden of proof was on the appellee. Of the \$2,670 cash appellant had on April 22d, he paid out, before he left Los Angeles, to attorneys and salesmen \$540. Arriving in Denver, he spent \$195 in rent, for accommodations in that city. The total thus accounted for amounts to \$735. This leaves \$1,935. In June, E. A. Lynch went to Denver and took from defendant all his textile stock and the sum of \$1,210.34 in cash. This left \$725 in cash unaccounted for. There is no evidence that this was not expended in necessary living expenses between April 24th and July 7th. The appellee failed to maintain its burden of proof that there was any of it left to conceal on July 7th.”

Accordingly, if the bankrupt corporation, through its officers, had expended corporate funds or transferred corporate property in payment of its business expenses prior to the appointment of the Trustee, it

would be presumed that the sums paid out and property transferred were paid out properly.

Hersh v. U. S. (9 Cir.) 68 F.2d 799.

There was some evidence that on November 21, 1952, Edwards, Ltd., contracted to purchase an old boat, with a down-payment of \$500.00 or \$1,000.00 (R. 626), which was then put in repair and which Edwards, Ltd., used in its business (R. 626, 536). It was contended that there was some connection between the withdrawal of funds involved and the contract of Edwards, Ltd., to purchase this boat. No such contention was ever proved. Assuming *arguendo* that it had been proved, the rule applies that even if the moneys spent and property transferred had been used to pay the personal expenses of the officers or even if the moneys spent or property transferred had been given away or transferred to hinder, delay or defraud creditors, such conduct would not constitute the "concealment" charged, the funds and property not being on hand when the Trustee was appointed.

U. S. v. Camp (D.Haw.) 140 F.Supp. 98;

In re Hammerstein (2 Cir.) 189 Fed. 37.

In the case at bar, the government's own evidence, both through the books of account and the accountant, Ester, showed that the money described in the various counts of the indictment were withdrawn by Max T. Edwards in repayment of advances made by him to the corporation and by him, in turn, expended principally in repayment of bank loans, which were the source of the funds that he used to advance interest-free to the corporation (Br. p. 7, *supra*). Certainly, the payment of corporate indebtedness or the sale of corporate

assets, such as the cash register for value (See Br. p. 17, *supra*), are both presumptively proper and are not concealment. *Hersh v. U. S.* (9 Cir.) 68 F.2d 799.

5. *The so-called presumption of continued possession is insufficient to prevent judgment of acquittal.*

a. *Money counts*

The government may contend that proof of the withdrawal of funds in December, 1952, and January, 1953 (the dates charged in the counts involved), raises the presumption that the money was taken by Max T. Edwards and was still in his possession on May 7, 1953, when the involuntary petition was filed (R. 169). The difficulty with this position is that the government's own evidence showed that the corporation was indebted to Max T. Edwards and that this so-called withdrawal was charged to his account in repayment of his advances (See Br. p. 8, *supra*). Thus, with this explanation in the government's own case, the "presumption" of continuance of possession or the inference of continuance of possession could not be drawn. *Maggio v. Zeitz*, 333 U.S. 56, 92 L.ed. 476, 68 S.Ct. 401, 405-407. This is especially true in the absence of evidence as to when the Trustee was appointed.

Furthermore, the defendants' evidence showed the same thing, Max T. Edwards accounting for the withdrawals, as was done, for example, in *Reiner v. U. S.* (9 Cir.) 92 F.2d 823.

b. *The cash register*

What has heretofore been said as to the funds largely applies to the transfer of the cash register. The government's evidence that the cash register had been

transferred to Edwards, Ltd., was not accompanied by any direct evidence that the transfer was improper or in bad faith or without consideration. Indeed, the government's own evidence showed the plan to close down and discontinue the Seattle store operations because of their profitless character (R. 318). This was disclosed to the creditors at the meeting of February 27, 1953 (R. 324). The government not only failed to show that this transfer was not in aid of this program of closing down the Seattle store operations or other legitimate reason, but failed to show that the transfer was not for value. The defendants' evidence showed that the transfer was in aid of the closing down operations and was for value (Br. p. 16, *supra*), a transfer entirely consistent with innocence.

In determining whether the evidence was sufficient to show continued possession or control on the date that the Trustee was appointed, or even on the date the involuntary petition was filed, May 7, 1953, the inference of continued possession amounts to little more than suspicion or scintilla evidence and does not exclude other hypotheses of innocence which the defendants' evidence established in fact and *which the court may properly consider*. *U. S. v. Gasomiser* (D. Del.) 7 F.R.D. 712 (Br. p. 28, *supra*). Under the principle that the District Court must enter a judgment of acquittal if the jury must find from the circumstantial evidence that the transfer was not concealed, a judgment of acquittal should have been entered here on the counts involved.

Karn v. U. S. (9 Cir.) 158 F.2d 568;

U. S. v. Gardner (7 Cir.) 171 F.2d 753.

c. *The adding machine*

So far as the portable adding machine is concerned, the government's evidence showed that the adding machine was in a Seattle store managed by Gilbert Edwards and that Gilbert Edwards had taken the adding machine home to use it (R. 422) and that it was not on hand when the State Court Receiver was appointed (R. 127). The government apparently contends that the "presumption" is that the adding machine was still in Gilbert Edwards' possession on May 7, 1953, when the involuntary petition was filed (R. 441). This presumption or inference does not necessarily follow. Thus, the government failed to show that the portable adding machine had not been delivered, for example, to another agent or officer of the corporation for his use in company business and thus was no longer in the possession or control of Gilbert Edwards. Indeed, the defendants' own evidence proved that very hypotheses of innocence, namely, that Gilbert Edwards had delivered the portable adding machine (inadvertently referred to as cash register) to Max T. Edwards, the president of the corporation, who used it in company business along with the typewriter and other items which he carried with him in his travels (R. 533, 758). In the face of the government's own evidence that the Seattle store was to be closed (R. 318-319) and that the cash register and other items, including the adding machine, were sent elsewhere, any inference of continued possession would, at best, be a matter of suspicion and conjecture rather than justifiable inference (*Maggio v. Zeitz*, 333 U.S. 56, 92 L.ed. 476, 68 S.Ct. 401, 405-407), not inconsistent with innocence (*Karn v. U. S.* (9 Cir.) 158 F.2d 568,

and certainly not proof beyond a reasonable doubt.

In re Taylor (N.D. Ala.) 188 Fed. 479, 484:

“ * * * fraudulent concealment of assets * * * by the bankrupt must be made out by clear and convincing proof and is not the subject of mere suspicion or inference.”

6. Judgment of acquittal should be ordered.

The government's evidence of continued possession or control on May 7, 1953, or thereafter, instead of meeting the standard of proof beyond a reasonable doubt, is at best nothing more than scintilla evidence, suspicion or conjecture accompanied by a failure to exclude other hypotheses consistent with innocence—hypotheses established, in fact, by the defendants' evidence. Judgment of acquittal should have been and should now be ordered.

Karn v. U. S. (9 Cir.) 158 F.2d 568;

U. S. v. Gardner (7 Cir.) 171 F.2d 753.

D. There was also no knowing or fraudulent concealment in fact.

1. The facts as to disclosure

The concealment, if any, must be “knowing and fraudulent.” It cannot be inadvertent or unintentional or in good faith or in the honest belief that what he is doing is right. See *Jones v. Gertz* (10 Cir.) 121 F.2d 782, pp. 783, 784, and cases *infra*. Furthermore, if it be assumed, contrary to what has been heretofore said, that possession or control in the defendants and each of them was shown or if it be claimed that concealment consists in the fraudulent withholding of knowledge of property belonging to the estate of the bankrupt

corporation, nevertheless the evidence is still not sufficient, as a matter of law, to establish the crime charged because the government did not otherwise prove beyond a reasonable doubt that the concealment in the sense of withholding of knowledge was "knowing and fraudulent."

The government did not prove and the evidence did not otherwise establish that the Trustee and creditors were ignorant of the facts concerning the funds or property which were the subject of the counts involved. Neither the Trustee (who did not testify at all) nor the creditors testified to any such ignorance. The books of the bankrupt corporation disclosed the facts (R. 302) relative to the payment of the sums which are the subject of the money counts (See Br. p. 13, *supra*).⁶ Mr. Ester, the accountant for the corporation, who was employed by both the Receiver and the Trust-

⁶The bookkeeping records between the Washington and Canadian corporations had always been kept in Vancouver, both in good times and bad (R. 280-281), Mr. Ester making adjusting entries on the books of the Washington corporation at the end of the year (R. 282). This practice did not show intent to conceal financial condition. *In Re Servel* (D.C. Idaho) 30 F.2d 102. During the British Columbia litigation, instituted on behalf of the Trustee (R. 619), Max T. Edwards made available the records showing the state of accounts between the Washington and Canadian corporations (R. 536, 613, 619) and which the plaintiff's attorney had in his possession for some time (R. 619). After the suit was settled, the records were returned (R. 526) and put in the Canadian store's basement. In some cleanup operations, some records were thrown out as being of no further use (R. 526). This was before the Indictment was served (R. 16-17). The financial statement of the Lewis Cutlery, Ltd. (R. 527-528) dated January 31, 1953, shows a contra account with the Washington corporation (R. 528) (see Br. p. 13, *supra*). The records involved have nothing to do with the money counts and have only to do with the cash register count, evidence of the transfer of which, however, could have been and was independently established by documentary evidence below (see Br. p. 16, *supra*). Certainly, the loss of the contra account records would not be evidence of concealment with respect to the counts charged, or otherwise. See *In Re Hirsh* (D.C. W.D. Tenn.) 96 Fed. 468, 476, 477.

tee, was available to the creditors at their meetings of February 27 (R. 322) and March 9 (R. 328) and to the Receiver (R. 301) and to the Trustee. There was no evidence that either defendant refused to reveal or answer questions. Gilbert Edwards not only cooperated with the Receiver (R. 374) but was examined by the Referee in Bankruptcy and testified to the affairs and property of the corporation (R. 732). Gilbert Edwards advised them as to what happened to those fixtures and equipment and disposition of funds (R. 732). This is disclosure—not concealment, hiding or secreting. *Dilworth v. Boothe* (5 Cir.) 69 F.2d 621, 623. Max T. Edwards was available, although the Trustee did not communicate with him by mail or otherwise. There was no evidence of any false statement, false affidavit or false bankruptcy schedule. There was no evidence that either defendant was aware or made aware of any information that was requested of him concerning any of the items which are the subject of the counts involved other than those matters as to which they were questioned and there was no evidence that questions put were not truthfully and fully answered. There was no evidence of any demand by Receiver or Trustee or any refusal to surrender (R. 605). *There is no evidence that anyone told either defendant that he had a particular duty to perform which he refused to perform or that either defendant violated any duty of which he had knowledge* (See Br. p. 54, *infra*).

2. *The Government failed to prove that the Trustee or creditors were ignorant of the facts.*

Before there can be a knowing and fraudulent con-

concealment, the Government must prove that the Trustee or creditors were ignorant of the facts. There can be no concealment of a matter as to which the adversely affected party has knowledge. Certainly, where the transfer is disclosed to the creditors there can be no concealment.

Hersh v. U. S. (9 Cir.) 68 F.2d 799;

Barron v. U. S. (1 Cir.) 5 F.2d 799, p. 804;

In re Hennebry (N.D. Iowa) 207 Fed. 882
(Disclosure before Referee).

Furthermore, proof of concealment requires something more than the mere failure to volunteer information to creditors, especially when creditors must be held to have had knowledge both as to the existence and whereabouts of an item claimed to be concealed.

In re Napco Mfg. Co., Inc. (D.Neb.) 72 F. Supp. 555.

Thus far, the argument has been predicated upon the knowledge of the creditors and of the Receiver prior to the filing of the involuntary petition on May 7, 1953. There is no evidence that the Trustee, after the date on which he was appointed and qualified, *as to which date there was no evidence*, did not have knowledge of all the facts. In fact, not only did the Trustee not testify, but the evidence on behalf of the defendants shows that there was a disclosure of the facts (Br. p. 12, *supra*).

Before the crime of concealment may be committed, the concealment must take place during the whole course of the bankruptcy proceedings. No such evidence appears here. See: *Johnson v. U. S.* (1 Cir.) 163 Fed. 30.

In re Morrow (N.D. Cal.) 97 Fed. 574;

In re Hirsch (W.D. Tenn.) 96 Fed. 468;

Gretsch v. U. S. (3 Cir.) 231 Fed. 57;

In re Hennebry (N.D. Iowa) 207 Fed. 882;

Johnson v. U. S. (1 Cir.) 163 Fed. 30.

In fact, the government disclaimed any intention to make such proof as to facts later than May 7, 1953, except as to one item, the nature of which is not clear (R. 167). Even if it be assumed, however, that disclosure must be made within a reasonable time after the Trustee is appointed, even that principle does not aid the government. At no time did the government prove either that the possession of the funds or the property was ever restored to the defendants, or either of them, following the appointment of a Trustee, or that information concerning such property was withheld from the creditors or the Trustee either knowingly or fraudulently (See Br. p. 54, *infra*).

3. Mere negligent nondisclosure or even a preference is not fraudulent concealment.

Assuming at the very worst that there was a careless or negligent nondisclosure of any of the items which are the subject of the counts involved, that is not the equivalent of a knowing and fraudulent concealment.

In re Morrow (N.D. Cal.) 97 Fed. 574.

Furthermore, the most that can be claimed resulting from the payment to Max T. Edwards or the transfer to Edwards, Ltd., is that a preference was effected as the result of the subsequent appointment of a Receiver or Trustee. However, it is settled that a mere preference is not fraudulent and is not the subject of unlawful concealment.

U. S. v. Alper (2 Cir.) 156 F.2d 222;

Levinson v. U. S. (6 Cir.) 47 F.2d 451 (Use of furniture to pay debts constitutes preference but not concealment).

E. As to Count XIX involving the transfer of a cash register, the evidence was also insufficient to show a transfer "in contemplation of a bankruptcy proceeding."

1. *The evidence which was wholly circumstantial is consistent with innocence and the jury could not properly have found otherwise.*

a. *As to both defendants*

Count XIX, unlike the remaining counts here involved, charged a fraudulent transfer as distinguished from a fraudulent concealment of a cash register. The transfer was presumptively innocent and in good faith. *Chodkowski v. U. S.* (7 Cir.) 194 Fed. 858. Not only was there a failure to show possession or the concealment of this cash register, as hereinabove set forth, but there was no direct evidence that the transfer was in contemplation of bankruptcy. Such evidence as there was was purely circumstantial. There was no evidence of discussion, consideration or contemplation in fact of bankruptcy at the time of the transfer [Attorney Sharp testified that he wasn't even consulted by either of the Edwards relative to bankruptcy prior to May 7, 1953 (R. 668)]. It is true there was evidence of financial difficulty and inability to pay and the fact that such inability had grown greater; but, at the same time, the evidence was that the company had always been undercapitalized, had always been in financial difficulty because so undercapitalized and had always been dependent upon credit and loans (See *In re Servel* (D.

Idaho) 30 F.2d 102, also Br. p. 5, *supra*). There was no evidence that prior to February 27, 1953, when an attachment was issued against the assets of the California corporation, anyone threatened bankruptcy (R. 668, 679) or that creditors were not cooperative. There was no evidence that bankruptcy was expected in the near future or at all when the transfer was made of the cash register. That the transfer was made for reasons entirely consistent with innocence appears from the uncontradicted evidence that the transfer was merely part of the program of closing down the Seattle store (the concessions which were profitable were to continue) because of the store's unprofitable character and the uncontradicted evidence that a continuance in the conducting of the business, as well as expansion, was sought, planned for and actually carried on (See Br. p. 5, *supra*). Why else would Max Edwards have continued to loan money to the corporation if he contemplated its bankruptcy, loans being made by him as late as February 13, 1953 (R. 772)? The evidence did not show any cause and effect relationship between the transfer of the cash register and the subsequent bankruptcy proceedings.

b. As to Max T. Edwards

The Government sought to show contemplation of bankruptcy (possibly under the other counts for which defendants were found not guilty) by offering in evidence plaintiff's Ex. 40, being a letter dated May 15, 1953, and Exs. 41, 42, 43, 44, 45 and 46. This was correspondence subsequent to the filing of the involuntary petition in which Max T. Edwards sought to make a

virtue out of necessity. He was explaining to a creditor that "it was necessary to let the whole corporation go by the board in order to abrogate the old contracts with the department stores, but more especially in order to kill the lease on the Seattle store." However, this explanation was after an involuntary petition in bankruptcy, *not* a *voluntary* petition, and was clearly consistent with an attempt to salvage something from the wreckage. If the letter had been written prior to bankruptcy, especially if it had been written prior to February 20, 1953, a different question would have existed; but having been written subsequent to May 7, 1953, especially in light of the other circumstances, it is difficult to understand how such correspondence could evidence a transfer of a cash register in contemplation of bankruptcy which was not otherwise in fact contemplated or shown to have been contemplated. At worst, there may have been a contemplation of insolvency or operation by creditors or an operation by a state court receiver. That, however, is not "contemplation" of bankruptcy as that term is understood in the decisions. The phrase "contemplation of bankruptcy" undoubtedly means that bankruptcy *must be the impelling cause of the transfer* (R. 803-804) (See *Conrad, Rubin & Lesser v. Pender*, 289 U.S. 472, 77 L.Ed. 1327, 53 S.Ct. 703, 705). Consequently, contemplation merely of a state of insolvency is not enough (R. 804). *In re Hirsch* (W.D. Tenn.) 96 Fed. 468, 477; *In re Carmichael* (N.D. Iowa) 96 Fed. 594, 596; *Jones v. Howland, et al.*, 49 Mass. (8 Metc.) 377.

The courts point out in the above cases that one may contemplate insolvency without contemplating bank-

ruptcy. The contemplation of insolvency, not of bankruptcy, is the most that it can be fairly contended was established in this case.

c. *As to Gilbert Edwards*

Furthermore, there was no showing that Gilbert Edwards had any knowledge of or had anything to do with the above correspondence. There was an entire absence of evidence that he contemplated the bankruptcy of the corporation involved.

F. *As to Count XIX, the evidence was also insufficient to show a transfer "with intent to defeat the bankruptcy law."*

- 1. *There was no proof that either defendant had any knowledge of the bankruptcy law or of any duty imposed upon them by law claimed to be violated.***

This "intent" implies a knowledge of the content of the bankruptcy law or a knowledge of a duty imposed thereby. The doctrine that ignorance of the law is no defense to crime does not apply where willfulness is an element of crime. Ignorance of a duty imposed by law negatives willfulness in failure to perform that duty.

Yarborough v. U. S. (4 Cir.) 230 F.2d 56, p. 61;

Hargrove v. U. S. (5 Cir.) 67 F.2d 820;

U. S. v. Murdock, 290 U.S. 389, 395, 396, 78 L.ed. 381, 54 S.Ct. 223.

In this case there is no evidence that either defendant knew the content of the bankruptcy law, or any provision thereof or of a duty imposed thereby (R. 615). Max T. Edwards was a Canadian subject. Furthermore, as to neither defendant was there any showing that either had consulted their attorney or attorneys

concerning possible bankruptcy. The evidence, indeed, affirmatively showed that they had not (R. 668). There was no showing that either defendant knew that in transferring the cash register, they were violating any duty imposed by law. Intent was thereby negatived.

Babb v. U. S. (5 Cir.) 252 F.2d 702, 708;

U. S. v. One Buick, etc. (N.D. Ind.) 34 F.2d 318, 320.

2. Such proof as there was, was wholly circumstantial, consistent with innocence, and the jury could not properly have found otherwise.

There is no evidence that there was any discussion or consideration or thought given to the transfer of the cash register on or about February 20, 1953, as having any bearing upon any possible bankruptcy because there was no bankruptcy then involved or in contemplation. There was, therefore, no evidence of any intent to defeat the bankruptcy law. The only evidence is that the transfer was made as part of the plan to close down the Seattle store. This was before there was any litigation; before there was any receiver; before there was any bankruptcy. It will be remembered that what we have here is involuntary bankruptcy, not voluntary bankruptcy. Had the bankruptcy been voluntary, it might be argued that it was contemplated or that it was intended to violate duties imposed by the bankruptcy law. That is not the case here.

G. As to Count XIX, the evidence was insufficient and judgment of acquittal should have been and should now be ordered.

Summarizing appellants' position as to Count XIX, the evidence was insufficient in that there was neither

possession nor control in the defendants or either of them of the cash register on and after the appointment of the Trustee, such possession and control having gone out of the bankrupt corporation to Edwards, Ltd., on or about February 20, 1953, the latter corporation being charged with the purchase price thereof; there was no concealment in fact by the knowing or fraudulent withholding of information concerning the cash register, and there was no showing that the Trustee or the creditors were ignorant of the transfer or the circumstances thereof; there was no showing that the bankruptcy was contemplated at the time of the transfer or that bankruptcy was the impelling cause of the transfer or even a factor motivating the transfer so as to justify the claim that the transfer was made in contemplation of bankruptcy; at best if there was a contemplation of anything other than the contemplation of the closing of the unprofitable Seattle store, it was a contemplation of nothing more than continued operation of the profitable concessions even under a slow-pay basis as formerly, or a contemplation of a possible operation under the supervision of creditors, or at the very most a possible state court receiver; finally there was no showing that the transfer was made with intent to defeat the bankruptcy law, there being no evidence that either defendant had knowledge of the content of the bankruptcy law or any provision thereof or of a duty imposed thereby claimed to be violated by the defendants.

There was a transfer, it is true, but under circumstances that were entirely innocent and entirely consistent with innocence. The elements of "knowing and fraudulent" and "in contemplation of bankruptcy"

and "with intent to defeat the bankruptcy law," not having been proved, judgment of acquittal should have been ordered on Count XIX and should now be ordered.

Karn v. U. S. (9 Cir.) 158 F.2d 568;

U. S. v. Gardner (7 Cir.) 171 F.2d 753.

H. As to Max T. Edwards, the evidence was also insufficient to prove venue.

Each of the counts charged Max T. Edwards with having violated the statute involved in Seattle, Washington. There is no evidence that any affirmative act of concealment, that is secreting or even withholding of information, took place in Seattle, Washington. True, the money to repay his advances was paid to Max T. Edwards or delivered to Edwards, Ltd., by Edwards Shaver Departments, Incorporated, apparently by checks mailed from Seattle. True also, the cash register was shipped from Seattle to Vancouver to Edwards, Ltd., by the Bekins Transfer Company. But the mailing of these checks and the shipping of the cash register did not constitute the crime of concealment. There could be no fraudulent concealment until the Trustee was appointed some time later. If we assumed that the Trustee was appointed on May 7, 1953, there is no evidence that Max T. Edwards, either by affirmative act or by inaction, did anything in Seattle, Washington, thereafter with reference to the items complained of. Thus there is no evidence that he withheld any information from the Trustee in Seattle, Washington, or made any false statement or false claim in Seattle, Washington. There is no evidence that Max T. Edwards himself took possession of the cash register in Seattle,

Washington. Edwards, Ltd., took possession of the cash register in Vancouver, British Columbia. If therefore there were a fraudulent concealment, such concealment took place in Vancouver, B. C., and not in Seattle. Under these circumstances, there was a failure of proof of an essential element, namely venue.

Venue must be proved as an essential element of the offense charged. *Rachmil v. U. S.* (9 Cir.) 43 F.2d 878. A motion for acquittal raises the question as to whether venue has been proved.

U. S. v. Browne (7 Cir.) 225 F.2d 751, 755;

U. S. v. Jones (7 Cir.) 174 F.2d 746, 748.

It is submitted that the defendant Max T. Edwards' motion for judgment of acquittal should also have been granted for failure to prove venue—an essential element of the offenses charged.

I. Insufficiency of all the counts involved as to Max T. Edwards—Summary

The government's evidence was insufficient as to the concealment of money counts, namely Counts III, VI, IX, XII, XV and XVIII, and as to the cash register concealment Count XX:

1. Because the government failed to prove possession or control of the items involved on and after the appointment of the Trustee. The money had been used in December, 1952, and January, 1953, to repay Max T. Edwards for his advances so that he in turn could and did repay bank loans incurred by him to raise funds with which to advance to the corporation, to pay life insurance premiums, and to assist his wife in a small way with an investment of hers. As to the cash

register, legal possession and control had passed to Edwards, Ltd., about February 20, 1953. Any control of Max T. Edwards thereafter was on behalf of Edwards, Ltd., a separate corporation with a life and creditors of its own. The cash register was therefore not property belonging to the estate of the bankrupt and could not therefore be the subject of concealment on or after the appointment of the Trustee. The government failed to prove when the Trustee was appointed and qualified.

2. Because the government failed to prove that there was a knowing or fraudulent withholding of information concerning the items involved. The government failed to prove in that connection that the creditors or the Trustee were ignorant of the facts. Assuming at best that Max T. Edwards negligently failed to disclose or received an unlawful preference created because of the subsequent appointment of a receiver or Trustee within four months after the payment of his advances, such conduct does not constitute the offense of concealment.

3. As to Count XIX, the claimed fraudulent transfer of the cash register count, in addition to deficiencies in the government's evidence summarized in subparagraphs 1 and 2 above, the government failed to prove that the transfer was "in contemplation of a bankruptcy proceeding." The government's evidence did not negative either the possibility or probability that the transfer was for a proper purpose such as a transfer for value in connection with closing down the unprofitable Seattle store operations. The likelihood of this proper purpose was confirmed by defendants' evidence as to what transpired in fact. The government therefore

did not establish that the impelling cause of the transfer or even a substantial reason for the transfer was "in contemplation of a bankruptcy proceeding." At best, if any contemplation was established, it was either a contemplation of closing the unprofitable Seattle store but continuing with the profitable concession business of the various department stores, or in contemplation of insolvency or continued insolvency or in contemplation of operation by creditors, or at the very most the contemplation of the appointment of a state court receiver. These are not equivalent to a contemplation of a bankruptcy proceeding.

4. Again as to Count XIX, the government's evidence did not establish that the transfer was "with intent to defeat the bankruptcy law" because it failed to show that the defendants either knew the content of the bankruptcy law or any provision thereof or of a duty imposed thereby. Without such knowledge, the necessary intent could not be established. The transfer for value in connection with the closing down operations of the Seattle store shows the transfer to have been consistent with innocence on this phase of the matter, that is, that the transfer was with no intent to defeat the bankruptcy law but rather to carry out a proper and innocent purpose.

5. The government's evidence failed to establish that the concealment of the funds or property complained of took place in Seattle, Washington, as charged by the counts of the indictment. Assuming that there was a concealment, it took place in Vancouver, British Columbia.

For each of the foregoing reasons, the evidence was

insufficient as to each of the counts involved, and the motion for acquittal should have been granted and should now be ordered.

J. Insufficiency of all the counts involved as to Gilbert Edwards—Summary

1. The evidence was insufficient as to Gilbert Edwards with respect to both the money counts and the cash register counts for the reasons 1, 2, 3, and 4 summarized in subparagraph I dealing with the insufficiency of the evidence as to Max T. Edwards. An additional circumstance applicable to Gilbert Edwards is that, unlike Max T. Edwards, he owned no stock in the bankrupt corporations so as to benefit from any of the transactions complained of. The likelihood of his innocence is therefore increased, and the burden of the government in applying the rule that circumstantial evidence must be inconsistent with innocence is correspondingly increased.

2. As to Count XXI charging concealment of a portable adding machine solely by Gilbert Edwards, the government's evidence was insufficient. (a) There was no evidence that Gilbert Edwards had either possession or control of the portable adding machine at the time of the appointment of the Trustee or thereafter and the government failed to negative the possibility or probability that such possession and control had properly passed from Gilbert Edwards to say another officer of the corporation such as Max T. Edwards. This possibility and probability was actually proved in the defendants' case. (b) There was no evidence that the creditors or Trustee were not fully aware of the facts

concerning the delivery of the adding machine so that there was neither a knowing or fraudulent withholding of information. Defendants' evidence established affirmatively that there had been a disclosure as to what happened to the fixtures and equipment and disposition of funds (R. 732-733). The government failed to prove that the conduct of Gilbert Edwards with respect to the portable adding machine was not inconsistent with innocence so as to constitute the crime of fraudulent concealment. Judgment of acquittal should have been ordered below and should now be ordered (See Br. p. 39, *supra*).

Specification of Error No. 4

II.

The District Court Prejudicially Erred in Submitting to the Jury Counts of the Indictment on Which the Evidence Was Not Sufficient, Assuming *Arguendo* that the Evidence Was Sufficient as to Other Count or Counts of the Indictment. Accordingly, the Judgment Should Be Reversed and a New Trial Ordered.

A. The defendants were prejudiced thereby warranting a new trial.

It may be assumed *arguendo* that the court may reverse as to some counts and affirm as to others where the evidence is clearly segregated and compartmentalized, so that one can say that particular evidence is applicable to a particular count. If, however, there is submitted to the jury counts as to which the evidence is insufficient to permit a verdict of guilty, such submission may prejudicially affect the defendants as to other counts as to which it may be assumed *arguendo* the evidence is sufficient. The prejudicial error involved here is of several kinds.

1. Evidence which would not be admissible in the absence of the particular count is admitted with prejudicial consequences to the defendants as to other counts.

2. The assumption by the jury that there is evidence sufficient to convict the defendants of the crime charged when the assumption is unwarranted because of the insufficiency of the evidence.

3. The inadmissible evidence and the unwarranted assumption of the sufficiency of the evidence may and do prejudice the jury in the consideration of other counts of the indictment as to which the evidence may be *prima facie* sufficient but as to which the jury if unprejudiced by these inadmissible items might draw conclusions of innocence.

These items of prejudice are all the more detrimental in a case of this kind involving 21 counts. The same circumstantial evidence was used as background material for all the counts (See Br. p. 2, *supra*). In some instances evidence was offered as to particular counts or as to a particular defendant (R. 129-130, 131, 136, 244, 246). Later when the court instructed the jury, the instructions were long and abstract. It is impossible for any jury, including the jury here involved, to remember what evidence was offered as to what counts and as to what defendant and how to apply oral instructions of a lengthy and abstract nature to the particular facts of this case as to 21 counts. This is all the more true since the oral instructions do not go into the jury room for study and consideration. What has heretofore been said is made even worse by the erroneous admission of certain evidence and the erroneous exclusion of certain evidence (Spec. Err. 5, 6, 7, 8, 9).

When therefore the jury found the defendants guilty on a number of counts as to which the evidence was really insufficient (see Br. p. 30, *supra*), it is difficult to resist the conclusion that the jury were adversely affected in their consideration of other counts assuming *arguendo* that the evidence was sufficient as to these. The jury might well have used evidence applicable to a count as to which the evidence was insufficient and inferences and conclusions based thereon to convict the defendants as to counts on which there was at least a close question as to whether guilt existed or as to which the evidence may have been insufficient.

One cannot safely say that had the defendants been tried on one, two or three counts only, uninfluenced by the mass of evidence which would then have been inadmissible, or as to which the evidence was insufficient, that the result would have been the same (See also Spec. Err. 10) (Br. p. 72, *infra*).

If the error as to one count (whether in the admission of evidence or because the insufficiency of the evidence precludes submission thereof to the jury) prejudicially affects the count on which the jury has found a defendant guilty, a new trial should be granted.

U. S. v. Perlstein (3 Cir.) 120 F.2d 276, 283;

U. S. v. Koch (2 Cir.) 113 F.2d 982;

U. S. v. Groves (2 Cir.) 122 F.2d 87, 91;

People v. Adler, 73 N.Y. Supp. 841.

Furthermore, unless it affirmatively appears that the error was insubstantial and therefore not prejudicial, a new trial should be granted (See Br. p. 29, *supra*, and p. 72, *infra*).

III.

The District Court Prejudicially Erred in Overruling Objections Interposed on Behalf of the Appellants and Each of Them to Evidence Adduced on Behalf of the Government.

A. Specification of Error No. 5; in admitting Plaintiff's Ex. 24 (R. 353)

Plaintiff's Ex. 24 is a letter from Edwards Shaver Departments, Incorporated, to Mr. Cosby, Receiver, signed by Max T. Edwards, the letter being dated March 27, 1953, demanding the return of general ledgers of "my California corporation (Edwards Shaver Departments, Inc.) along with all money, inventory sheets, check registers, general paper and mail." The letter requests the delivery of these items to his attorneys, attention: Seth W. Morrison.

The evidence showed that Mr. Cosby was receiver only of the Washington corporation and not of the California corporation. It was, therefore, in the judgment of the corporations and Max T. Edwards' attorney, improper for Mr. Cosby to hold possession of the California corporation papers. Obviously acting under the attorney's advice (his own evidence confirmed this) (R. 586), Max T. Edwards demanded that Mr. Cosby surrender up papers improperly in his possession. This could have no possible bearing upon the counts of the indictment either as to Max T. Edwards or certainly as to Gilbert Edwards, who was not shown to have had anything to do with the matter. Its only effect was to prejudice the defendants as if there was something improper about the demand. Yet, any lawyer would have advised Mr. Edwards to do exactly what he did do

without dreaming that taking such advice would in anywise be evidence of anything improper.

See *In re Topper* (3 Cir.) 229 F.2d 691, holding that the advice of counsel may be an excuse for an inaccurate or false oath so as not to preclude a discharge in bankruptcy. The admission of Ex. 24 was especially prejudicial here as indicating to the jury an effort to suppress evidence (even by Gilbert Edwards). See *McWhorter v. U. S.* (6 Cir.) 281 Fed. 119.

B. Specification of Error No. 6; in admitting Plaintiff's Ex. 12 (R. 149)

Plaintiff's Exhibit 12 is a check dated February 12, 1953, by Edwards Shaver Departments, Incorporated, signed by Max T. Edwards, payable to Gilbert Edwards in the sum of \$2,000. The government's own evidence showed that Gilbert Edwards had lent Edwards Shaver Departments, Incorporated, \$1800 August 5, 1952 (R. 308, 347, 348), which sum was owing on the date in question. The withdrawal represented a repayment without interest plus a small advance prior even to the meeting with creditors of February 27, 1953. The innocent character of this transaction is evidenced by the fact that as early as January, 1952, consideration had been given to expansion of the business by the incorporation of two companies which were, in fact, incorporated under legal advice (R. 482-483, 603, 655, 656) of two reputable attorneys about February 9, 1953 (Pl. Exs. 25 and 26). Gilbert Edwards was the owner of record pending a determination (which was never made) as to which of the Edwards brothers should become stockholders and in what amount (R.

674). In order to provide these corporations with funds, Gilbert Edwards was paid \$2,000, so that he received \$200 more than he had lent the corporation if we ignore the interest to which he would normally be entitled on any loan to the corporation. No count charged that there was anything improper about this \$2,000 payment to Gilbert Edwards. Counts XIII, XIV and XV involve a sum of \$2,000, but not the \$2,000 with which we are presently concerned. Just how this evidence could have any bearing upon any of the counts involved, it is difficult to see. The transaction was an entirely innocent one and nothing improper was shown about it. Gilbert Edwards, at the time of the payment of the \$2,000, was still working for the Washington corporation; still receiving a salary of \$350 a month, plus expenses, and an advance of \$200 at best over his interest-free loan of \$1800 could easily have been charged against his salary and expense account so that the corporation was fully protected at all times. Just because Gilbert Edwards received \$2,000 (fully disclosed on records) at a time when he was owed \$1800 under the circumstances above, could not possibly have any bearing upon concealment involved in the money counts. Those moneys had been paid out sometime prior to the \$2,000 payment to Gilbert Edwards in repayment of Max Edwards' advances. Nor could it have any bearing upon the transfer of the cash register as having been fraudulently made because that transfer, as has been pointed out above, was made as part of the closing operations of the Seattle store and for which Edwards, Ltd., was charged. It would have no bearing upon the concealment of the adding machine because it had no connec-

tion therewith and no rational inference could be drawn from the \$2,000 payment that could constitute proof of such concealment. Yet, to offer this evidence, especially in connection with other evidence showing a purchase by Shaver Raids, Inc., of receivership assets at a sale (R. 371-372) as though there were something improper about that, too, could only have a prejudicial effect by the use of irrelevant and immaterial evidence. This is one of a series of items, the cumulative effect of which apparently proved prejudicial.

If the Government contends that Ex. 12 was admissible on a count as to which the defendants were held not guilty, nevertheless, this inadmissible evidence was prejudicial as to the counts on which the defendants were found guilty, and a new trial should be ordered.

This is all the more true in this case because the Government on occasion would offer its evidence as to a particular count or as to a particular defendant, but on other occasions would offer its evidence generally (R. 129-30, 131, 136, 244, 246).

C. Specification of Error No. 7; in permitting the government's witness, Benjamin Kendall Cosby, State Court Receiver, to testify concerning the sale of assets of Edwards Shaver Departments, Incorporated (the bankrupt corporation) to Shaver Raids, Inc., owned by Gilbert Edwards (R. 361).

It is difficult to understand how evidence that Shaver Raids, Inc., purchased assets of the State Court Receiver at sale could have any possible bearing upon the counts of the indictment. How could it possibly prove concealment of the funds paid out the previous December and January? How could it possibly have any

bearing upon the sale of the cash register to the Canadian corporation? How could it possibly have any bearing upon the claimed concealment of the adding machine? It was merely a step in the course of the receivership. The testimony had the effect of making it appear that there was something improper about the sale and from which the jury could infer something improper about the action with respect to the other counts of the indictment. The testimony was especially immaterial as well as prejudicial since it was the position of the Government that the defendants had not been guilty of any concealment from the Receiver (R. 169).

D. Specification of Error No. 8; in permitting Government witnesses to testify concerning the amount received by general creditors percentagewise from either the State Court Receiver or the Federal Court Trustee in Bankruptcy or both (R. 249-251, 99-100).

Since it was independently established that the assets were insufficient to pay creditors at the time of the filing of the petition for bankruptcy, it is difficult to understand how evidence of the percentage received by general creditors from the state court receiver or the Trustee in bankruptcy could properly be evidence of "the intent of the defendants in making the transfer alleged" (R. 99). The amount paid by the receiver and Trustee is determined by expenses of administration as well as assets available and neither of the appellants had any control over the amount of such expenses or over the percentage payable to general creditors. The amount received has nothing to do with "intent." The

only purpose served by this testimony of the percentage paid was to prejudice the jury by a matter not material or relevant to the issues. This evidence only served to enhance the prejudice created by the admission of other improperly received evidence in light of inadequate instructions from the court (See Br. p. 73, *infra*).

Specification of Error No. 9

IV.

The District Court Prejudicially Erred in Sustaining the Government's Objection to Admission of Defendants' Ex. A-22 (R. 501).

Defendants' Ex. A-22 (Brief, Appendix B) is a written accounting of the sums of money described in the counts of the indictment showing where the money came from and what happened to the money. The trial court refused to permit the introduction of Ex. A-22 in evidence in the absence of a stipulation permitting its introduction, because the court believed he had no discretion in the matter of its introduction.

The rule, however, is that such an exhibit may be admitted in the discretion of the court. Exhibits summarizing testimony have been admitted in criminal cases.

Eggleton v. U. S. (6 Cir.) 227 F.2d 493;

Keller v. President, et al., 41 Del. 471, 24 A.2d 539.

See also:

32 C.J.S. 592;

22 C.J. 896.

The court was, therefore, in error in excluding the exhibit and refusing to exercise the discretion which he had to permit its introduction.

It might be contended that since the evidence of which Ex. A-22 is a summary had already been testified to orally, no prejudice resulted from the refusal to permit the written summary to be placed in evidence. The prejudice, however, is obvious. No jury could possibly keep in mind the details of the accounting. Unless the jury had before it in the jury room a written summary of the accounting evidence, the jury was compelled to speculate on what the evidence was. The evidence was highly material because it had a direct bearing on the counts of the indictment concerned with the accounting testimony. With the accounting testimony before them in comprehensible form, as set out in Ex. A-22, the jury might well have recalled the intricate accounting evidence and concluded that the Trustee in Bankruptcy had adequate notice of the withdrawals and the reasons therefor and could not possibly have contended successfully that the information had been concealed from him. We cannot know what the jury relied on in coming to the conclusion that concealment had taken place. We know from elsewhere in this brief that the evidence was insufficient as a matter of law on which to predicate a charge of concealment. The jury, having found the defendants guilty on money concealment counts, might well have been influenced by that fact on the transfer Count XIX or the concealment Counts XX and XXI dealing with the adding machine and cash register. Had the court exercised the discretion it had, to admit the exhibit, the result of the case might have been different. The refusal to exercise such discretion, in the mistaken notion that no such discretion existed, is, therefore, prejudicial error.

If there is any question about the prejudicial effect of the non-admission of this exhibit, or of the erroneous admission of evidence (Spec. Err. 5, 6, 7, 8) the rule announced in *U. S. v. Andolschek* (2 Cir.) 142 F.2d 503, 506, should be remembered:

“We cannot, of course, know, as the record stands, how prejudicial the exclusion may have been, but that uncertainty alone requires a new trial; for it does not affirmatively appear that the error was insubstantial within the meaning of 28 U.S.C.A. §391.”

See also Br. p. 29, *supra*.

Specification of Error No. 10

V.

The District Court prejudicially erred in denying appellants' respective motions for new trial filed March 19, 1958, pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure, such denial constituting an abuse of discretion.

We are aware of the rule that a motion for new trial in the interest of justice (Rule 33) is granted or denied in the discretion of the District Court, and the exercise of such discretion is ordinarily not reviewable.

Balestreri v. U. S. (9 Cir.) 224 F.2d 915, 916. However, there is language suggesting that the ruling of the District Court is reviewable if there is abuse of discretion.

Steiner v. U. S. (9 Cir.) 229 F.2d 745, 749.

Not wishing, by not complaining of the action of the District Court in denying the motion for new trial, to infer acquiescence—and bearing in mind the possibility that review is appropriate where there has been an

abuse of discretion—the action of the District Court has, therefore, been assigned as error (See also Spec. Err. 4, Br. p. 62, *supra*).

It will be borne in mind that evidence concerning the essential elements of the crimes charged, namely, “knowing and fraudulent,” “contemplation of bankruptcy,” and “intent to defeat the bankruptcy law” was purely circumstantial. It will be remembered that there are in this case demonstrable hypotheses of innocence wholly inconsistent with guilt. It will be remembered that the jury had to consider twenty-one counts in an involved case and had to remember what evidence was applicable to all counts, what evidence was offered as to one defendant and not against the other, and what evidence was applicable only to particular counts. It will be remembered that particular instructions given by the court were quite abstract and voluminous and it will be remembered that the jury does not take such instructions for study and application in the jury room. The omission of pertinent instructions on the entire record becomes all the more serious, especially in the case where the evidence as to guilt is extremely close. Here, the jury was inadequately instructed on the significance and nature of control and possession in relation to the counts on which the defendants were convicted charging concealment (R. 807) (Br. p. 38, *supra*). Furthermore, the jury was not instructed at all upon the significance of the so-called presumption or inference of continued possession on which the government relied below in taking the case to the jury (R. 441). Still further, there was an entire absence of in-

structions on the significance of the advice of legal counsel as bearing upon the question as to whether any action taken was taken in good faith, as distinguished from being taken knowingly and fraudulently. It will be recalled that the evidence showed that Mr. Alexander Charles Sharp, a British Columbia attorney, and Mr. Gerald DeGarmo, a Seattle attorney, the legal advisers of the corporations involved, were actually in attendance during the discussions and meetings with creditors. Mr. Sharp testified to his participation in the activities of the corporation and of the defendants. Since the issue of good faith was a vital issue in the case, had the jury been instructed that following the advice of an attorney and acting with his knowledge and approval negatives or may negative claimed knowing and fraudulent conduct, the result might well have been different. Still even further, there was no instruction that ignorance of a duty imposed by law negatived intent to violate the law. The instructions given were inadequate (R. 806, 807, 808) (Br. p. 54, *supra*). [They also erroneously assumed the Trustee was appointed May 7, 1953 (R. 807)]. While it is true that the defendants did not request the instructions nor take exception to the failure of the court to instruct on these four points, nevertheless, the failure of the jury to have those legal principles reviewed and called to the jury's attention may well, in view of their importance, have constituted a substantial factor in the jury's verdict of guilty.

Assuming that the failure to instruct the jury on these important matters is not independently assignable as error (See, however, *Tatum v. U. S.* (C.A.D.C.)

190 F.2d 612; *Stephenson v. U. S.* (9 Cir.) 211 F.2d 702, 705),⁷ nevertheless, they are considerations which should properly be taken into account on a motion for new trial to prevent the miscarriage of justice. A jury should understand the case. *U. S. v. Di Matteo* (3 Cir.) 169 F.2d 798.

The errors complained of invite a careful evaluation of the matters occurring at trial, the necessity for which evaluation is spurred by the severity of the sentences imposed on each defendant. Although it is recognized that the severity of sentences has been held not reviewable here (*Kachnic v. U. S.* (9 Cir.) 53 F.2d 312, 315; *Allred v. U. S.* (9 Cir.) 146 F.2d 193) and for that reason is not assigned as error, and, although the District Court, under F.R.C.P. 35, may reduce the sentences imposed in the event of affirmance of judgment, nevertheless, at this stage, the severity of the sentences may well alert the Court, in the interests of justice, to make certain that error was not committed. It is difficult to understand how, under the evidence in this case showing the repayment of admitted advances to Max T. Edwards (Br. p. 6, *supra*), any three-year sentence could possibly be justified. It is even more difficult to understand how, with respect to Gilbert Edwards, who benefited not at all from these repayments, any sentence of two years could be justified. Furthermore, with respect to the used cash register, valued at \$126, or with the portable adding machine, the value of which is not in the record (had the value been suffi-

⁷ We do not waive the benefit of the Rule 52 (F.R.C.P.) permitting plain errors or defects affecting substantial rights to be noticed although they were not brought to the attention of the court.

ciently substantial, the government would undoubtedly have proved it), it is difficult to understand how a three-year and two-year sentence could be justified.

CONCLUSION

It is respectfully submitted that judgment should be reversed as to each defendant and as to each count involved with directions to enter judgment of acquittal, or alternatively to order a new trial.

Respectfully submitted,

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APPENDIX A

EXHIBITS	<i>Identified</i>	<i>Offered and Received</i>	<i>Offered and Rejected</i>
Pl. Ex. 1	101	779	
2	107	736	
3	108	115	
4	110	.....
5	120	120	
6	128	128	
7	137	.....
8	138	139	
9	140	140	
10	141	142	
11	143	145	
12	145	149	
13	150	150	
14	151	151	
15	156	.....
16	156	.....
17	175	179	
18	180	191	
19	201	.....
20	204	204	
21	206	208	
22	210	213	
23	210	214	
24	345	353	
25	358	382	
26	359	383	
27	376	379	
28	384	387	
29	388	390	
30	390	391	
31	391	391	

EXHIBITS	<i>Identified</i>	<i>Offered and Received</i>	<i>Offered and Rejected</i>
32	392	394	
33	394	394	
34	395	395	
35	396	398	
36	397	398	
37	397	412	
38	404	405	
39	414	414	
40	561	561	
41	567	573	
42	568	573	
43	569	573	
44	569	573	
45	570	573	
46	572	573	
47	590	645	
48	641	643	
49	698	.....
50	753	755	
Deft. Ex. A-1	217	644	
A-2	269	271	
A-3	271	271	
A-4	296	297	
A-5	313	315	
A-6	313	315	
A-7	314	315	
A-8	314	315	
A-9	431	432	
A-10	454	455	
A-11	454	456	
A-12	460	460	
A-13	464	466	
A-14	464	465	
A-15	473	474	

EXHIBITS	<i>Identified</i>	<i>Offered and Received</i>	<i>Offered and Rejected</i>
A-16	477	477	
A-17	488	488	
A-18	490	491	
A-19	490	491	
A-20	494	495	
A-21	494	495	
A-22	496	.....	501
A-23	504	644	
A-24	505	644	
A-25	511	513	
A-26	514	515	
A-27	518	519	
A-28	527	644	
A-29	616	617	
A-30	622	622	
A-31	627	629	
A-32	627	630	
A-33	627	632	
A-34	720	721	

APPENDIX B

Cause 49562

Defendant Exhibit A-

Rejected

MAX T. EDWARDS

*Schedule of Disbursements of Principal Funds Transferred from
Seattle, Washington, December, 1952-January, 1953*

*Initials

1952		9320	
12/15/52	P.B.-M.E.	\$4,000.00	Prev. Bal. \$267.50
		9320	
		\$3,875.00	
	12/19	\$ 500.00	Cash
	12/20	2,000.00	G.A. and to Martin Ltd
	12/22	1,000.00	Mfg. Life Ins. Co.
12/30	P.B.-Ed. Ltd.	\$15,000.00	
	12/31	Ed. Ltd. to 9320	\$16,000.00
	12/31	9320	\$16,021.92 Imp. Bank
12/30	P.B.-Ed. Ltd.	\$5,000.00	
	12/31	Ed. Ltd.	\$5,000.00 Imp. Bank
12/30	P.B.-M.E. (9320)	\$7,500.00	
	12/31	M.E.-B.E.	\$2,144.54 end. to and depo
			ited Ed. Ltd.
	12/31	M.E.-Ed. Ltd.	\$ 874.63 and deposited
	12/31	M.E.-P.E.	\$ 430.44 end. and deposit
			Ed. Ltd.
Deposit \$4,000.00 from Ed. Ltd.			
	1/2	M.E.-Martin Ltd.	\$8,000.00
	1/5	M.E.-Martin Ltd.	687.94

1953		9320		Prior balance		21
1/12	P.B.-					2,021
		1/5	M.E.-Martin Ltd.	\$1,000.00		
		1/5	M.E.-B.E.	1,000.00		
1/22	P.B.-B.E.	1/22/53	\$3,000.00	to Imp. Bank		

*Denotations

P.E. = Peoples National Bank of Washington

Imp. Bank = Imperial Bank of Canada in Vancouver

M.E. = Max Edwards

B.E. = Bert Edwards

P.E. = Paul Edwards

Ed. Ltd. = Edwards Limited in Vancouver

9320 = joint account of Max and Goldie Edwards, his wife

(See Brief p. 70-72)

APPENDIX C

Excerpt from 18 U.S.C., Section 152

“§152. *Concealment of assets; false oaths and claims; bribery*

“Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or

* * *

“Whoever, while an agent or officer of any person or corporation, and in contemplation of a bankruptcy proceeding by or against such person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of such person or corporation; or

* * *

“Shall be fined not more than \$5,000 or imprisoned not more than five years, or both.”

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Court of Appeals
FOR THE NINTH CIRCUIT

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Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

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FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney
Western District of Washington

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United States
Court of Appeals
FOR THE NINTH CIRCUIT

MAX T. EDWARDS and GILBERT EDWARDS,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

Appellee accepts and adopts appellants' statement of jurisdiction.

STATEMENT OF THE CASE

A. *The Questions Involved*

Appellants were convicted of violations of 18 U.S.C. § 152 in fraudulently transferring and con-

cealing assets of a bankrupt corporation of which they were officers and agents (R. 1-13).

Max T. Edwards was convicted of eight counts and Gilbert Edwards of nine. Both were acquitted of the remaining twelve counts in the indictment (R. 38-41).

Both appellants were sentenced on Count XIX (R. 38-44), which charged that a cash register belonging to the corporation was transferred to Canada in contemplation of a bankruptcy proceeding with fraudulent intent to defeat the bankruptcy law (R. 12, 38-41). It was alleged that such transfer occurred on or about March 6, 1953 (R. 12). The proof showed that it was shipped on February 20, 1953 (R. 764).

The bankrupt was separately incorporated in Washington and in California; but at all material times the two corporations were operated as one, under the same name (R. 92, 97, 354).

Involuntary petitions in bankruptcy were filed after the transfer of the cash register. The California corporation became bankrupt, within the meaning of 18 U.S.C. § 151, on March 27, 1953 (R. 168). The Washington corporation similarly became bankrupt on May 7, 1953 (R. 168).

The twelve counts resulting in verdicts of not guilty charged transfers of six specified sums of money in contemplation of bankruptcy on six designated days in December of 1952 and January of 1953,

and conspiracies on and before each such date to effect each such transfer (R. 1-13, 38-41).

Appellants were convicted on six counts of the indictment charging concealment of the same sums of money from the creditors and from court officers in a bankruptcy proceeding, on and after May 7, 1953 (R. 1-13, 38-41). The sums of money aggregated \$36,500 (R. 1-14). The sentences on those six counts are concurrent with that imposed on the offense of transferring the cash register in contemplation of bankruptcy.

Appellants were each likewise convicted and given concurrent sentences on a charge of concealing the cash register from the creditors and court officers in a bankruptcy proceeding, on and after May 7, 1953 (R. 1-14, 38-41).

Gilbert Edwards alone was charged, convicted and given a concurrent sentence on the twenty-first, and last, count of the indictment. It alleged concealment of an adding machine from creditors and court officers in a bankruptcy proceeding, on and after May 7, 1953.

The summary of appellants' argument appearing at page 25 of their brief shows that as to Count XIX, appellants contend that the Government failed to prove that the transfer of the cash register was in contemplation of a bankruptcy proceeding and with fraudulent intent to defeat the bankruptcy law.

As to the other counts which resulted in concur-

rent sentences, they assert that the Government failed to prove that the defendants had possession or control of the items of money and property described in the several counts of the indictment at the time of the appointment of a trustee; failed to prove there was a knowing and fraudulent withholding of information from the trustee or creditors; and failed to prove, as to appellant Max T. Edwards, that the offenses took place within the venue of the trial court.

From the same summary of argument, it further appears that appellants urge that submission to the jury of the counts which resulted in acquittal was prejudicial error.

The appellants likewise assert that there was reversible error in the court's rulings on evidence at the trial and in its instructions to the jury.

Without regard to the merits of the claims of error, it appears that they have been properly brought before this court by due and timely written notices of appeal from the judgments of conviction.

B. The Indictment

Count XIX, upon which the sentences against each of the appellants were imposed, reads as follows:

"That on or about March 6, 1953 at Seattle in the Northern Division of the Western District of Washington, a more exact date being to the grand jurors unknown, MAX T. EDWARDS and GILBERT EDWARDS, being officers and agents

of a Corporation, to-wit, Edwards Shaver Departments, Inc., in contemplation of a bankruptcy proceeding by and against the said corporation, and with intent to defeat the bankruptcy law, knowingly, and fraudulently transfer to Vancouver, British Columbia, one cash register, the property of the said corporation."

Counts II, V, VIII, XI, XIV and XVII, upon which appellants were found not guilty, are similar in language to Count XIX. They charge transfers during December of 1952 and January of 1953, of specified sums of money aggregating \$36,500.

Counts I, IV, VII, X, XIII and XVI, which likewise resulted in verdicts of not guilty, charge conspiracies to commit the substantive crimes alleged in Counts II, V, VIII, XI, XIV and XVII.

Counts III, VI, IX, XII, XV and XVIII charge concealment of the same specified sums of money from the court officers and creditors in a bankruptcy proceeding on and after May 7, 1953. Appellants were convicted of each of these charges and given sentences concurrent to that imposed on Count XIX.

Count XX charges appellants with similar concealment of the cash register. They were convicted on that charge also, and received a concurrent sentence on it.

Count XXI charges that Gilbert Edwards similarly concealed an adding machine. He was convicted on Count XXI and given a sentence concurrent with that imposed upon Count XIX.

C. The Bankrupt

Edwards Shaver Departments, Incorporated, the bankrupt, was separately incorporated in Washington and in California. Its business was the retailing of electric razors and related items. The Washington and California corporations were first organized in 1946, under different names, by appellant Max T. Edwards. Prior to the incorporation, he owned and operated an electric razor sales and repair business in Seattle under a trade name (R. 340, 341, 354, 447, 488, Ex. 5).

Originally, the Washington and California corporations were treated as distinct entities, but by 1952 they were operated, for all practical purposes, as one corporation (R. 92, 97). Appellant Max T. Edwards was president and the only substantial stockholder (R. 96). Appellant Gilbert Edwards, his brother, was his first assistant in the operation of the business (R. 96). Both were directors and officers (Ex. 5).

When the Washington corporation was formed in 1946, it took over the Seattle business and opened another electric razor retail store in Portland (R. 447, 448). The California corporation started similar retail establishments in San Francisco and Los Angeles (R. 449). Max T. Edwards also had a retail shaver business in Vancouver, British Columbia. It was incorporated as Edwards, Limited (R. 444). He also owned Lewis Cutlery, Limited, a Vancouver cutlery business (R. 444, 445).

During 1952 and 1953 there was an exchange of merchandise between the retail outlets of the chain. Appellant Gilbert Edwards treated the Vancouver Corporation as a branch of the corporations in the United States (R. 423-425, 431-434, 727).

In 1952 and 1953 the corporations in the United States had only one remaining store (R. 88). They had closed corporation owned stores, but had increased the number of retail outlets and the total volume of retail business by opening electric shaver concessions in major department stores on the Pacific Coast (R. 451-453, 702).

The number of concessions expanded rapidly. By 1952 Edwards Shaver Departments, Inc. (Washington and California) had concessions in the Broadway Department Stores in Los Angeles, Macy's in San Francisco, Olds & King in Portland, and Bon Marche in Seattle (R. 100, 452-453).

So far as appeared to customers, each concession was the electric razor sales and service department of the department store in which it was located (R. 86, 87).

Typically, the contract of the department stores with Edwards Shaver Departments, Inc. was to the effect that the department store would furnish space and credit facilities, as well as the use of its name, for twenty percent of the gross receipts of the department (R. 87, 88). Edwards Shaver Departments,

Inc., provided the stock in trade, employees, and advertising (R. 87, 88).

In 1952 additional concessions were opened in some of the same department stores. The new concessions sold foreign cutlery at retail (R. 464).

The razor concession contracts required the closing of any competing private store which the concessionaire had previously been operating in the city where the department store was located (R. 87). All of the stores except that in Seattle were closed to comply with such agreements (R. 88). Despite the contract with the Bon Marche in Seattle, for various reasons, the Seattle store was never closed (R. 762, 777).

While the corporations' activities had been limited to the operation of private retail electric razor stores, such stores had been very profitable (R. 279). As the operations of the corporations changed from private stores to concessions in department stores, volume increased tremendously, but the over-all operations did not show any substantial profit (R. 457. Ex. A-5, A-6, A-7, A-8).

Concession sales of \$77,209.25 during part of 1949 resulted in a loss of \$3,994.00 (R. 315. Ex. A-5). In 1950 there was a net loss of \$2,605.25 on sales of \$215,312.92 (Ex. A-6). In 1951 there was a net income of \$1,332.87 on sales of \$206,398.98 (Ex. A-7). For the year 1952 there are records indicating a net profit of 3.059 percent on department store sales. That record shows \$8,179.22 net profit on sales of \$267,-

430.88 (Ex. A-8). However, the record may be of doubtful accuracy. There was an unexplained \$30,000 shrinkage of assets during 1952 (R. 750) and a claimed loss of \$16,000 on the remaining private store which served as the office of the chain (R. 612, 749).

It appears that some of the concessions were, or could have been, profitable, but that the chain included poor concessions (R. 277-278, 681).

Appellants considered the opening of other similar concessions in various parts of the country and continued correspondence relative to new concessions as late as 1953 (R. 511, 512, 514, 692, 759).

During 1952, the year preceding the bankruptcy, Max T. Edwards did not receive any salary from the corporations, but did receive substantial amounts as an expense allowance (R. 279-280). During the last four months of 1952 he received \$2,600 for expenses (R. 599). He testified in another court proceeding that \$300 per month of such allowance constituted salary (R. 599, 600). Appellant Gilbert Edwards received a salary of \$350 per month plus an expense allowance (R. 702).

D. *The Bankruptcy*

While the bankruptcy of Edwards Shaver Departments, Inc. was preceded by a relatively lengthy history of financial difficulty, the immediate precipitating cause of the bankruptcy was an attachment in a California state court on February 27, 1953

(Ex. A-26). The attachment caused concession agreements to be cancelled (R. 518-519, 521, Ex. A-1, A-27).

On March 11, 1953 a receiver was appointed by a state court in Washington on application of a petitioning creditor (R. 168). On March 27, 1953 an involuntary bankruptcy petition was filed in California (R. 168). A similar petition was filed in Federal court in Seattle on May 7, 1953 (R. 168). A receiver was appointed in the California bankruptcy case on March 27, 1953 (R. 98). The record does not disclose the date on which a receiver or trustee was first appointed by the Federal court in Seattle, but the first adjudication of bankruptcy in Washington was on May 27, 1953 (R. 168).

The bankruptcy proceedings in California were dismissed on the condition that all of the assets be transferred to Washington, and that the two corporations be treated as one for purposes of the proceedings (R. 169). [The corporations had been operated as one business before the bankruptcy (R. 92, 97)]. All subsequent administration of the bankrupt's affairs was by the bankruptcy court in the Western District of Washington (R. 169).

The bankrupt had liabilities of \$123,000 and assets with a book value estimated between \$60,000 and \$70,000 (R. 555. Ex. 3). The appellants agreed that a realistic book value was in the neighborhood of \$60,000 (R. 554, 745). The liquidation value of the assets was less than \$60,000 (R. 554, 695). The even-

tual distribution to general creditors of the bankrupt was about 16 $\frac{3}{4}$ % of the amount of the claims (R. 250). Included in the amounts paid to creditors was money received by the trustee in settlement of a suit commenced by him, in Canada, against Max T. Edwards and others. That settlement was in the amount of \$10,000 (R. 525-526). The record does not show what expenses the trustee incurred, either for the suit in Canada, or for other purposes in connection with the orderly liquidation of the estate of the bankrupt.

E. The Evidence That the Transfers of Money and Machinery Took Place

It is not necessary to refer the Court to the items of evidence which, taken together, establish that there were transfers to Canada of the cash register and of the sums of money which were alleged and set forth in the indictment. Appellants took the stand, and each admitted that such transfers took place, but denied that the transfers were fraudulent or in contemplation of bankruptcy. They further admitted the approximate accuracy of the dates of such transfers alleged in the indictment, except that Max T. Edwards disagreed with the charge in Count XIX that the cash register was transferred on or about March 6, 1953, and correctly stated that it was transferred some time in February (R. 532-533, 740-741). It was actually shipped on February 20, 1953 (R. 764. Ex. A-34), although it did not pass customs in Canada until some time in March (R. 228-229. Ex. A-34).

F. *The Evidence As to Possession of the Money and Machinery After Bankruptcy*

The Government did not introduce any evidence as to what occurred to the money, the cash register, or the adding machine after the transfers became complete. Its *prima facie* proof of possession after bankruptcy consisted of proof of the transfers and of the circumstances under which such transfers were made.

Appellants each testified in their own case that the adding machine and the cash register were in the possession or under the control of Max T. Edwards at all times after May 7, 1953 (R. 533, 741). Max T. Edwards would have returned the adding machine if Gilbert Edwards had asked for it (R. 533).¹ Gilbert Edwards testified that the cash register was purchased by a Canadian corporation of Max T. Edwards (R. 766).

Appellants produced records showing that bank loans had been made to Max T. Edwards and his Canadian corporations during 1952 and were subsequently repaid (Ex. A-17, - A-21).

Max T. Edwards testified that all but about \$10,000 of the \$36,500 transferred from the corporation was used to repay bank loans made for the exclusive benefit of the business in the United States

¹ It is to be noted that the words "cash register" were used in place of "adding machine" in two questions appearing at Page 533 of the Record.

(R. 534). He denied that it was ever necessary to borrow money for either of his Canadian corporations (R. 623). But defendant's Exhibit A-28 showed that Lewis, Ltd., one of the Canadian corporations, had a bank overdraft of \$2,589.89 and a bank loan of \$5,000. A record similar to Ex. A-28, but relating to Edwards, Ltd., the other Canadian corporation of Max T. Edwards, was available to appellants, but not offered at the trial (R. 529).

Max T. Edwards testified as to certain cash disbursements following his receipt of \$36,500 from the United States corporations (R. 490-506). He could not recall all the details of his disbursements (R. 497). Some money went into a real estate investment in the name of Mrs. Edwards, who purchased an apartment house (R. 604). Max T. Edwards received \$10,000 in notes from Mrs. Edwards covering that investment (R. 604).

The only admitted income of Max T. Edwards in 1952 was a total of \$8,750.00 from his Canadian corporations (R. 628). However, one of those corporations purchased a yacht for which it had slight need (R. 535). The boat was a used 55 foot twin screw motor vessel (Ex. A-28). Max T. Edwards testified that he paid approximately \$6000.00 for it when he purchased it on November 21, 1952 (R. 625-626). The price was paid in monthly installments with five hundred or a thousand dollars as an initial payment (R. 626).

Max T. Edwards could not recall how much money he had on May 7, 1953 (R. 605). When asked if it was \$5.00 or \$5,000, or more than \$5,000, he answered, "I wouldn't have any idea" (R. 604-605). He denied knowing the value of his interest in Edwards, Ltd., of which he was the largest stockholder (R. 538, 605).

Max T. Edwards testified, on direct examination, that the \$36,500 was spent before the bankruptcy occurred (R. 483-506). On cross-examination, he admitted that on May 7, 1953 (when both the Washington and the California corporations had become bankrupt (R. 168)), he still had some proceeds of that money; i.e., the \$10,000 note and money in an unspecified sum (R. 605). His excuse for not turning those assets and the adding machine and cash register over to the trustee was that: "I wasn't asked to" (R. 605). He gave a similar reason for not advising the receiver of the ownership of a profitable private brand of shaver accessories which had wide consumer acceptance and which appellants still sold at the time of trial (R. 549-553).

There was documentary evidence that the trustee not only asked for money, but sued to recover it. He received \$10,000 in settlement of that suit (Ex. A-29).

*G. The Evidence of Intent With Relation
to Count XIX*

The facts with relation to Count XIX are here set forth in some detail because the primary sentence was imposed on it. Other sentences were concurrent to that imposed on Count XIX (R. 38-41). As has been stated, Count XIX charged that appellants, as officers and agents of Edwards Shaver Departments, Inc., knowingly and fraudulently transferred a cash register to Vancouver, B. C., in contemplation of a bankruptcy proceeding by or against their corporation and with intent to defeat the bankruptcy law. The shipment of the cash register to Canada on or about February 20, 1953 was admitted by appellants at the trial (R. 532, 533, 740, 741). Their status as officers and agents of the bankrupt is clear (R. 96, 756, Ex. 5, 24). The Government's remaining burden on this charge was to show that the transfer was in contemplation of a bankruptcy proceeding by and against Edward Shaver Departments, Inc., and that such transfer was knowing and fraudulent with the intention of defeating the bankruptcy law. The Government's proof of that state of mind of appellants was circumstantial. It is outlined below.

*G1. Financial Condition of the Corporation and
Difficulties in Obtaining Merchandise*

The dollar volume of the business done by Edwards Shaver Departments, Inc., increased very rapidly (R. 457). Due to a lack of capital, supplies of

merchandise necessary to maintain a high sales level could be kept on hand only if they were obtained from manufacturers and wholesalers on relatively long-term credit arrangements (R. 474-475).

Until 1951, Remington was one of the larger suppliers and the largest creditor (R. 103). However, during and after 1951, the corporations were able to get credit from Remington for only such amounts as could be paid within twenty days (R. 771). While still getting good credit from Remington, Edwards Shaver Departments, Inc., also purchased part of its stock in trade from other suppliers (R. 105). Some time after it discontinued large purchases from Remington, large quantities of goods were obtained from Marshall-Wells (R. 105). By the end of the year 1951, Marshall-Wells was the largest creditor (R. 106), but there were no purchases on credit from Marshall-Wells in 1952 (R. 767).

In order to avoid legal action which would have closed Edwards Shaver Departments, Inc., appellants entered into an arrangement with Marshall-Wells whereby Marshall-Wells reduced the obligation approximately 8%, received \$5,000 in cash and the balance in interest-bearing trade acceptances (R. 768. Ex. A-15). Gilbert Edwards did not consider that an out-of-the-ordinary transaction for Edwards Shaver Departments, Inc. (R. 768).

Cut off from supplies from Marshall-Wells and Remington except on a cash or near cash basis, the cor-

poration began buying larger quantities of material from General Electric, Graybar, and other suppliers (R. 767, 768, 771. Ex. 2).

During the early fall of 1952 Hall Company agreed to extend credit up to \$5,000 (R. 237). Hall Company was a new corporation, resulting from the merger of a wholesale jewelry company and a wholesale appliance company (R. 235). Its comptroller had been with the appliance distributing company (R. 235). The jewelry company had engaged in the wholesale sale of electric shavers and parts (R. 236).

Hall Company was three to four weeks behind in posting its own books (R. 240). Due to such bookkeeping shortcoming and to carelessness in the comptroller's office of the Hall Company, over \$40,000 of merchandise was sold on credit to Edwards Shaver Departments, Inc., despite the \$5,000 limit placed by the Hall Company comptroller (R. 240). He did not learn that such an amount of credit had been extended to the Edwards company until around Christmas of 1952 (R. 240).

Only token payments were made to the Hall Company (Ex. 2). Other suppliers received payments substantially less than the amount of their invoices during the latter half of 1952 (Ex. 2). As a result, obligations of Edwards Shaver Departments, Inc., as of the end of 1952 approximated \$123,000 (Ex. 3). The book value of assets was then \$60,000 (R. 554). The financial position of the company, as of the end of 1952,

was approximately \$60,000 worse than it had been twelve months before (R. 748).

G2. Unexplained Loss During 1952

Appellants testified that Edwards Shaver Departments, Inc., lost \$60,000 in 1952 (R. 555, 743-750). There was evidence that the concessions made a profit during 1952 (R. 748) and that there was only one private store still operated during 1952 (R. 749). That store may have lost \$16,000 during the year 1952 (R. 338, 749). (But see Appendix A, *infra*, to the contrary). Part of a loss on a California store closed at an earlier date was written off the books in 1952. The remaining \$30,000 of the total \$60,000 loss during 1952 could not be explained by Gilbert Edwards (R. 750).

G3. Shipments of Inventory Items to Canada

There was evidence from which the jury could either infer that the unexplained loss of \$30,000 during 1952 was due to shipments of electric shavers and parts to the Canadian corporations, or find, as appellants testified, that the Candian corporations shipped merchandise to the Washington corporation which was more valuable than the shavers and parts sent to Canada from the United States. All parties agree that shavers were shipped to Canada and that cutlery was sent to the United States, but there was conflicting evidence as to the extent of those transactions.

A bookkeeper employed by Edwards Shaver Departments during the last half of 1952 and early 1953,

testified that during all the time that she worked for the firm, one of her duties was to make up invoices for shipments of electric shavers to Edwards, Ltd. (R. 423-424). Most shipments were of quantities having a retail value of at least several hundred dollars (R. 425). She would file copies of the records of shipment in the Seattle office (R. 428), but did not see any of such copies after the state receivership was in effect (R. 428), although she was employed for the first two weeks of the receivership (R. 425). Those records were not on hand when the receiver took over the store (R. 277, 280).

Appellants, on the other hand, each testified that cutlery and similar merchandise was shipped from the Canadian corporations to those in the United States and that shavers and parts were shipped from the United States to Canada. They introduced records showing some such shipments from Canada to Seattle (Ex. 50, A-31).

Max T. Edwards testified that there once had been other similar records (R. 629).

Appellants testified that a contra-account was kept by a secretary in the Vancouver store, and that at the end of 1952, there was a balance of approximately \$7,000 due the Canadian corporation (R. 528, 529, 756). They did not make any claim for that balance in the bankruptcy proceeding (R. 614). They asserted that all copies of all records covering shipments from Seattle to Vancouver were kept in Van-

couver (R. 525, 755). Such records were purportedly destroyed by accident after having been submitted to the attorney for the Washington bankruptcy trustee, for his inspection, in the course of the Canadian suit by the trustee against appellants and others (R. 526).

Gilbert Edwards admitted that two copies of invoices were made for at least some shipments, from Seattle to Vancouver, and that there was no reason why both copies should be kept in Vancouver (R. 755-757).

Max T. Edwards testified that most cutlery sold by Edwards Shaver Departments, Inc. was shipped from one of his Vancouver corporations which, in turn, imported from factories in Europe (R. 464). On cross-examination he admitted that cutlery was imported directly from Europe to Seattle by Edwards Shaver Departments, Inc. and that when, as a matter of expediency, some German and Swedish cutlery was shipped to Vancouver from Seattle, it involved paying duty twice (R. 598). A clerk employed by Edwards Shaver Departments, Inc. testified that the cutlery she recalled came from Sweden and Germany, although some may have come from Vancouver (R. 431).

G4. Missing Records of the Bankrupt

The records of the corporation left for the receiver did not include a single record or even a memorandum relating to any shipment of merchandise to Canada (R. 280). Records of the corporation purported to be complete for the years 1952 and 1953 were turned over

to the state court receiver (R. 277). Records for earlier years were not given to him (R. 277), nor were all of the 1952 and 1953 records actually surrendered to the receiver. Max T. Edwards produced some of them at the trial (R. 578. Ex. A-13, A-14, A-25, A-31, A-32, A-33). He made excuses for his failure to give some of those records to the receiver or trustee (R. 545, 578-579, 629).

G5. Evidence of Plan to Have Concessions Operated By New Corporation Free of Old Debts and Old Contracts, After Bankruptcy of Old Corporation

There was evidence that some of the concessions, such as Macy's in San Francisco and Bon Marche in Seattle, were profitable (R. 277-278). Others, such as the Weinstock-Lubin outlets had possibilities (R. 277-278). The Broadway group would only have been good if it was possible to operate in some, but not all of the Broadway stores (R. 277-278). Some concessions were not profitable (R. 681). It was apparently possible to open other concessions in large department stores where they may have been profitable (Ex. A-10, A-11, A-12, A-13, A-14, A-25). Appellants had the "know-how" to operate such concessions (R. 744).

But, as of the end of 1952, the Edwards Shaver Departments, Inc. was in apparently hopeless financial condition with liabilities of \$123,000 and assets with a book value of \$60,000 (R. 554, 745). It was also burdened with contracts requiring it to operate unprofitable concessions (R. 278, 565), and had a

lease on a store in Seattle that required payment of \$500 a month rent for three more years (R. 608).

It was under these circumstances that on February 18, 1953, articles of incorporation were filed in Nevada for a corporation named "Shaver Raids, Inc." (Ex. 26, R. 559). That was just two days before the shipment of the cash register to Canada. One purpose of the corporation, as shown in the articles of incorporation, was the operation of concessions for the sale of electric razors (Ex. 26).

The money for the new corporation, including its initial bank balance of \$1,000, came from Edwards Shaver Departments, Inc. (Ex. 12, 35, 36, 37, 38. R. 145, 395-409, 741-742). Appellants claimed that the \$2,000 of Edwards Shaver Departments, Inc. funds that went into the accounts of "Shaver Raids, Inc." and a similar new corporation called "Cutlaire, Inc." was repayment of \$1800 previously loaned to Edwards Shaver Departments, Inc. by Gilbert Edwards and an advance of \$200 to Gilbert Edwards (R. 171), but the \$2,000 check was entered in the records of Edward Shaver Departments, Inc. as a miscellaneous expense (R. 147).

Appellants also claimed that Shaver Raids, Inc. was caused to be formed by Edwards Shaver Departments, Inc. for the merchandising of a brand of products of that name which was put out by Edwards Shaver Departments, Inc. (R. 483, 512, 549-550, 675).

Shaver Raids, Inc. purchased all of the Bon Marche

assets of Edwards Shaver Departments, Inc., from the state court receiver for \$1900 on April 3, 1953, after negotiations between Gilbert Edwards and the receiver (R. 370, 372). As of the time of the trial, Shaver Raids, Inc. still operated the Bon Marche concession (R. 552, 742). Gilbert Edwards, on behalf of Shaver Raids, Inc., made a similar attempt to purchase the physical assets of some of the Broadway concessions, but was not successful (R. 742). He testified on cross-examination that if he had been able to buy the physical assets, he would have carried on the concession business in California, just as he did in the Bon Marche (R. 743).

Cross-examination of Max T. Edwards included the following questions and answers (R. 559-560):

- Q. Do you know when that corporation [Shaver Raids, Inc] was established?
- A. I think it was established in January of '53.
- Q. Would it refresh your recollection if I tell you that Exhibit 26 in evidence shows that the articles of incorporation were filed February 18, 1953? If you don't know, you can just so state.
- A. No, I don't know.
- Q. Now, isn't it a fact, Mr. Edwards, that it was the [552] intention of Gilbert Edwards and yourself to arrange contracts with the various department stores that had concessions which had proved profitable to Edwards Shaver Departments, Inc. in the past whereby under the new corporation, Shaver Raids, Inc., you and your brother would continue the old

business in the United States department stores?

A. I would qualify that to the extent that it wasn't me and my brother.

Q. Well, what was your intention in that regard?

A. I had no intention.

Q. Well, you said you were going to qualify what I had suggested by saying, 'It wasn't me and my brother,' if I remember your words.

A. My knowledge was that my brother probably would proceed on his own.

Q. Well, now, rather isn't it a fact that you had found that the entire operation in the United States was not profitable, you were saddled with a lease on the Seattle store that required payments of \$500 a month in rent, that the corporation had obligations to outsiders of \$123,000, and that you hoped to continue the operation without the drain of the Seattle store and without the drain of having to pay creditors for merchandise supplied in the past, and didn't you so advise an acquaintance of yours in [553] writing?

A. I don't think so in just that way.

The writing referred to in the last above quoted question is Ex. 40, which is the the original of a letter, dated May 15, 1953, written by Max T. Edwards to a friend (R. 567, 576, 577), and produced by the Government at the trial (R. 561). It includes the following words of Max T. Edwards:

“* * * You must surely have received a letter from us quite some time ago, advising you directly of the change in our United States corporation

set-up! I am sure you did, but you probably did not pay proper attention to it. It was necessary to let the old corporation go by the boards in order to abrogate the old contracts with the department stores, but more especially, in order to kill the lease on the old Seattle store. You are aware of the fact that we have been trying to sell that store, or get rid of it for almost a year, and the landlords would not release us from our commitments from the lease. * * *

“P.S. For your further information, Shaver-aids, Inc. purchased for cash all of the assets, lock, stock, and barrel, of Edwards Shaver Departments, Inc.”

Max T. Edwards cooperated in attempts by Gilbert Edwards to obtain concessions for Shaver-aids, Inc. (Ex. 22-23). It is to be noted that in support of that attempt by Gilbert Edwards, Max T. Edwards wrote to a department store and denied that any money was withdrawn by him to Canada and stated that any money taken out of Edwards Shaver Departments, Inc. was exactly the amount loaned by a bank and required to be paid back to the bank (Ex. 22). As has been shown (this brief, pp. 12-14), the amounts withdrawn by Max T. Edwards from Edwards Shaver Departments, Inc. in December of 1952 and January of 1953 exceeded by at least \$10,000 the amounts then paid to banks, either directly or indirectly, on behalf of Edwards Shaver Departments, Inc., even if none of the money borrowed from banks had been used for the benefit of either of his Canadian corporations.

The attempts to arrange concession agreements for Gilbert Edwards were made during March and

April of 1953 (R. 588. Ex. A-27, 22, 23). That was done while the inventory of Edwards Shaver Departments, Inc. was held first by state officers in insolvency proceedings, and later by such a state receiver in Washington and by a bankruptcy receiver in California (R. 98, 168-169). The inventory had relatively little value, if sold at a forced sale of shavers and parts, as distinguished from a sale of a shaver sales and service business (R. 665-666, 695). Such eventual forced sale of inventory apparently produced only a small return, as the creditors received less than 17% from the trustee, although the inventory had a book value approximating fifty percent of the liabilities (R. 249-251, 99-100, 541, 695).

When Gilbert Edwards succeeded in getting the new concession at the Bon Marche, he and his corporation became the only logical bidders for the assets on hand in the store (R. 370-373).

G6. Payment of Money Owed to Max T. Edwards by His Corporations in the United States

Edwards Shaver Departments, Inc. owed Max T. Edwards sums of money which he had loaned to it. As an unsecured creditor of the corporation he was second only to the Hall Company at the end of 1952 (R. 107, 118. Ex. A-4, Ex. 2). There is evidence that Max T. Edwards was not then fully aware of the extent of the financial crisis that faced his corporation (R. 317-318). However, it appears from cross-examination of Gilbert Edwards that there was a unit in-

ventory control which showed the day-by-day sales of each department. It made it possible to determine the approximate financial condition of the corporation at all times (R. 739-740). Assets at the end of 1952 approximated \$60,000 and liabilities \$123,000 (R. 554, 745).

It was under these circumstances that Max T. Edwards wrote to the department stores where the corporation had concessions and asked for advance payment against amounts due to the concessionaire, but not payable until the 10th of January, 1953 (Ex. 17, 20, 21). Substantial advances were received from the department stores (R. 414, Ex. 17, 20, 21). The appellants then caused \$36,500 to be sent to Canada (R. 532, 740).

That total sum was slightly larger than the amount that was owed to Max T. Edwards, because balanced against the amounts he had advanced to the corporation, there was an unpaid stock subscription of Max T. Edwards and an obligation for a Cadillac automobile which was transferred to him by the corporation (R. 122).

The excess amount transferred to Canada was returned to the corporation early in 1953 with the net result that Max T. Edwards was paid, from the inventory eventually received slightly less than 17% of the solvent corporation, neither more nor less than it owed to him (R. 122, 614). The other unsecured creditors amounts owed to them (R. 541).

G7. Events Coincident in Time With the Transfer of the Cash Register

On February 17, 1953, an order was placed with Bekin Van and Storage Company for shipment of the cash register to Vancouver, British Columbia, Canada (Ex. A-34). On the same day, a letter explaining the fact that the corporation could only stay in business with the cooperation of the major creditors was sent to such creditors (R. 631-634. Ex. A-33). The cash register was picked up by the movers on February 20, 1953 (Ex. A-34). On February 25, 1953, a representative of the Hall Company had a discussion with Max T. Edwards and was told that Max T. Edwards proposed paying 25% of the amount due the Hall Company in full settlement of the obligations to the Hall Company, but that such payments would be over a period of one year (R. 242). Max T. Edwards denied having made any such suggestion (R. 509). Shaver Raids, Inc. was incorporated February 18, 1953 (Ex. 26).

G8. The Transfer of the Cash Register

A clerk employed by Edwards Shaver Departments, Inc., testified that she came into work one morning early in 1953 and found that a late model cash register, some office furniture, and an adding machine were gone (R. 421-423). An old cash register and some old furniture replaced the missing newer items (R. 423).

The state court receiver discovered that an old cash register had been merely borrowed from a supplier in town, and returned it to him (R. 356). The missing cash register had been purchased a year and a half earlier from the National Cash Register Company (R. 128) for \$475.00 (R. 766). It was invoiced to the Canadian corporation for \$126, but no records of the Canadian corporation were produced at the trial to show whether even that modest sum was credited to the Washington corporation (R. 766).

Gilbert Edwards testified that the cash register was shipped to the Canadian corporation and a rented machine substituted in the Seattle store because the Seattle store was in process of being closed (R. 761-765). He claimed there was greater use for the cash register in Vancouver than in Seattle, but admitted that no emergency required its immediate transfer and the renting of another machine (R. 763).

Both Max T. Edwards and Gilbert Edwards insisted in their testimony at the trial that the Seattle store was being closed (R. 608-609, 761). There was evidence to the contrary.

A concession arrangement with Bon Marche in Seattle started in 1949. The written agreement for the concession required closing of the Seattle store (R. 777). Some time after entering into that contract with the Bon Marche, Edwards Shaver Department, Inc. signed a lease for a new location for the Seattle store (R. 770-771). As of the time when the cash reg-

ister was transferred to Canada, the lease on the new store premises had three years to run, and required payment of \$500 a month rental (R. 608).

The store had once been offered for sale for \$18,000, plus inventory (R. 612). It did not sell and Max T. Edwards testified that he intended to close it down and continue to pay the \$500 a month rent for three additional years (R. 608-609).

The store was the headquarters for training personnel (R. 720) and had an even more useful purpose as the office of the chain of Shaver concessions (R. 612). As a matter of arithmetic, it appeared either to be a profitable operation at the time when appellants purportedly intended to close it and continue paying rent on the space, (R. 608-611), or that it at least would have been profitable if the rent was eliminated from consideration (Appendix "A"). (The rent was payable even if the store was closed.)²

Max T. Edwards denied that the Seattle store gave him a bargaining position with the Bon Marche in an attempt to obtain a larger percentage for the concession operation (R. 596). He admitted that the

²The record shows (R. 609) that Max Edwards was asked on cross-examination if the Seattle store did not do an average of \$6000 or \$7000 a month total gross business and the witness agreed that such was possibly a fair estimate. An analysis of Ex. 47 shows that the total gross business was only approximately \$4000 per month on a year round average. The analysis is set forth as Appendix "A" to this brief. It shows, among other things, that the store, using the generous expense allowances set out at pages 610-611 of the record, lost money only because of the high rent which would have continued even if the store was closed.

store was directly across from the Bon Marche and was selling the same merchandise and providing the same services (R. 596). A slight change in the percentage arrangements with the department stores would have made the Edwards Shaver concessions profitable (Ex. A-5, A-6, A-7, A-8).

Max T. Edwards testified on direct examination that most of the Shaver business was referred from the Seattle store to the Bon Marche, and that the store became fundamentally a gift shop with various types of gifts, mostly cutlery (R. 478).

On cross-examination, Max T. Edwards was confronted with records and admitted that only a small percentage of the sales of the Seattle store were of cutlery, the bulk of the business being in Shavers, shaver repairs and shaver accessories. The sales records of the store so showed, (R. 589-594. Ex. 47). Exhibit 47 (sheet entitled "Department Transactions") also shows that 279 electric razors were sold by the Seattle store during the last three months of 1951, and that during the same months of 1952, 450 were sold by the same store. The same record sheet shows that the Bon Marche sales of razors increased in the same period, but at a slower rate.

*G9. Other Evidence of the State of Mind of Appellants
on February 20, 1953*

There was evidence, as against appellant Gilbert Edwards only, that directly showed his state of mind on February 27, 1953, seven days after the cash reg-

ister was shipped to Canada. He described Max T. Edwards as "a fool" for bringing \$3,000 back from Canada and depositing it to the credit of Edwards Shaver Departments, Inc. (R. 132, 134). (If Max T. Edwards had not returned that money, he would have taken more from the bankrupt than he advanced to it (R. 122)).

There was evidence, as to Max T. Edwards only, that he attended a creditors meeting on February 25th or 26th, 1953 (R. 241, 244) and that he refused to agree to a suggestion that Edwards Shaver Departments, Inc. borrow about 50% of the amount of its obligations from the department stores and work out long-term payments on the balance (R. 243). Max T. Edwards' best offer to the creditors was to pay \$20-\$25,000 to the three larger creditors on obligations approximating \$80-\$85,000, provided he could get advances from the department stores (R. 247-248). Max T. Edwards denied that he ever made any such suggestion at the creditors' meeting (R. 539, 542).

Cross-examination of a Government witness disclosed that Mr. Max T. Edwards stated on February 26 or February 27, 1953, that he feared Horn & Cox would take some kind of action (R. 272). Max T. Edwards, on the other hand, testified on direct examination that the attachment by Horn & Cox which precipitated the involuntary insolvency proceedings came as a "bolt out of the blue" (R. 517). On cross-examination he admitted that he had some warnings from Horn & Cox, but didn't think that they were any

more threatening than the average collection letters (R. 544). He agreed that he had kept the Horn & Cox correspondence, and did not know why it had not been left in the files of the corporation for the receiver (R. 544-545). In any event, Exhibit A-26 establishes that on February 27, 1953, all property at retail outlets of Edwards Shaver Departments, Inc., at nine separate locations in the Los Angeles area, were attached on the suit of an assignee of Horn & Cox. Bankruptcy soon followed.

SUMMARY OF ARGUMENT

Appellants, as officers and agents of Edwards Shaver Departments, Inc., caused its cash register to be transferred to Canada. There was ample evidence to sustain the finding of the jury that such transfer was knowing and fraudulent and that it was in contemplation of a bankruptcy proceeding against the corporation or with intent to defeat the bankruptcy law. Concealment is not an element of that crime, which was complete before bankruptcy began.

All evidence adduced at the trial was material to the issues created by the charge of transferring that cash register. Even the evidence introduced for the primary purpose of showing guilt or innocence as to other Counts in the indictment tended to show appellants' state of mind when they caused that transfer. Further, the sanctions imposed on other counts consisted of terms of imprisonment concurrent with, rather than consecutive to, the sentence imposed on the

crime of transferring the cash register in contemplation of bankruptcy. Accordingly, the judgment should be affirmed without regard to the appellants' guilt or innocence of the other charges.

In any event, appellants were properly convicted of the other charges, which involved concealment of property of the bankrupt after bankruptcy.

Nor should the convictions be reversed because of alleged error in the court below. There was no prejudicial error.

POINT I

APPELLANTS WERE PROPERLY CONVICTED OF TRANSFERRING THE CASH REGISTER TO CANADA

Count XIX, upon which the primary sentence was imposed, charged knowing and fraudulent transfer of the cash register by agents of the corporation in contemplation of bankruptcy of the corporation and with intent to defeat the bankruptcy law. It did not charge concealment of the cash register. Concealment is not a necessary element of the crime although concealment, with or without transfer, is also an offense. *Shapiro v. United States*, 101 F. 2d 375 (C.A. 7, 1939), cert. den., 306 U.S. 657, 83 L.Ed. 1054, 59 S.Ct. 744; *Viles v. United States*, 193 F. 2d 776 (C.A. 10, 1952), cert. den., 343 U.S. 915, 76 L.Ed. 1330, 72 S.Ct. 650.

In the Shapiro case the court held (101 F. 2d 375, 379) :

“As to the bulk transfer transaction, it is appellants' contention that concealment as well as the

transfer itself is necessary. The statute provides that the offense is complete if the corporate agent "concealed or transferred" any of the corporate property in contemplation of bankruptcy or with an intent to defeat the operation of the Bankruptcy Act. The object of Congress in passing this criminal statute was to punish those debtors who, although wanting relief from their debts did not want to surrender what property there was to the creditors. Under such circumstances the objective of the criminal statute is defeated either by a transfer or a concealment. Therefore, it seems to us that the statute was meant to condemn either a transfer or a concealment. A statutory condemnation follows *a fortiori* where, as in the instant case, the transfer was in bulk and to a personally controlled transferee. This construction of the statute is strengthened by a later amendment which expressly eliminates problems of construction thereafter by substituting the words "concealed or, with or without concealment, transferred." 52 Stat. 855, 11 U.S.C.A. § 52 (b) (6). That a District Court has held that concealment was an essential element does not disturb our construction of the statute. *U. S. v. Posner*, D.C., 3F. Supp. 252."

As was held in *Coghlan v. United States*, 147 F. 2d 233, 237 (C.A. 8, 1945), cert. den., 325 U.S. 888, 89 L.Ed. 2001, 65 S.Ct. 1569:

"The crime is complete when the act of concealment or transfer is completed with criminal intent. *United States v. Knickerbocker Fur Coat Co.*, 2 Cir. 66 F. 2d 388. Section 29, sub, b(6) as amended, defines a criminal concealment as one in contemplation of bankruptcy, thus eliminating the necessity of continuity required in the cases prior to the enactment of this amendment."

The Knickerbocker decision of the second circuit, which was cited in the above quotation, points out that it is not even necessary for bankruptcy to ensue, if contemplation of it, or intent to defeat the bankruptcy laws, motivated the concealment or the transfer. *United States v. Knickerbocker Fur Coat Co.* 66 F. 2d 388, 389-390 (C.A. 2, 1933), cert. den., 290 U.S. 673, 78 L.Ed. 581, 54 S.Ct. 91.

A transfer is fraudulent under the bankruptcy law if made within one year of bankruptcy with actual intent to hinder, delay or defraud either existing or future creditors. 11 U.S.C. § 107 (d)(2)(d).

The elements of the crime charged in Count XIX are: (a) status as agent or officer of the corporation; (b) contemplation of a bankruptcy proceeding by or against the corporation or intent to defeat the bankruptcy law and (c) knowing and fraudulent transfer.³

The status of appellants as officers and agents of Edwards Shaver Departments, Inc. and the fact of the transfer of the cash register on February 20,

³The crime alleged in Count XIX is a violation of the provisions of the sixth unnumbered paragraph of 18 U.S.C., Section 152. The other counts in the indictment, which resulted in conviction, are under the first paragraph of that section.

All of Section 152 of Title 18 has been taken, with modifications, from Section 29(b) of the Bankruptcy Act of 1898. Unnumbered paragraph 1 of Section 152 is the present equivalent of subdivision 1 of Section 29(b).

In the 1898 Bankruptcy Act Subdivision 1 covered concealment by a bankrupt of his own property. By the 1926 amendment (44 Stat. 662) Subdivision 1 was broadened to cover concealment of property of the bankrupt from the trustee or other court officer by any person. That 1926 amendment also added a new Subdivision 6 to Section 29(b). That new subdivision is the predecessor of the sixth unnum-

1953, are not disputed, but appellants contend that the Government failed to prove that the transfer of the cash register was in contemplation of a bankruptcy proceeding or with intent to defeat the bankruptcy law and was knowing and fraudulent.

The Government's evidence of appellant's state of mind was necessarily circumstantial. *Walters v. United States*, 256 F. 2d 840, 841 (C.A. 9, 1958). That does not mean that this court should weigh the evidence to determine if the circumstantial evidence was consistent with any hypothesis other than that of guilt. That is a function of the jury. *Lattanzio v. United States*, 243 F. 2d 801, (C.A. 9, 1957); *Walters v. United States*, supra; *McCoy v. United States*, 169 F. 2d 776 (C.A. 9, 1948), cert. den., 335 U.S. 898, 93 L.Ed. 433, 69 S.Ct. 298.

The rule set forth in *Glasser v. U. S.*, 315 U.S. 60, 80 provides the standard to be applied by this Court. That rule was quoted and relied upon, in *Blassingame v. United States*, 254 F. 2d 309 (C.A. 9, 1958):

bered paragraph of present § 152 of 18 U.S.C., under which the cash register transfer charge in the present indictment was drawn. No such crime of transfer in contemplation of bankruptcy existed before 1926.

The Chandler Act of 1938 amended Subdivision 1 to add concealment from creditors to the prior offense of concealment from the trustee or other court officers. (52 Stat. 840)

The dates of those amendments are of importance in this appeal. Many of the cases relied upon by appellants construe early penal provisions of the bankruptcy laws which required "continuing concealment" through the entire bankruptcy proceeding or concealment from a trustee rather than from trustee or from creditors.

Transfer in contemplation of bankruptcy became a crime in 1926. Concealment from creditors in any bankruptcy proceeding was first made a penal offense by the Chandler Act of 1938. *Collier on Bankruptcy*, 14th Edition, Section 29.

“It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.”

in other words:

“If reasonable minds could find that the evidence excludes every reasonable hypothesis but that of guilt the question is one of fact and must be submitted to the jury.” *Remmer v. United States*, 205 F. 2d 277, 288 (C.A. 9, 1953), reversed on other grounds, 347 U.S. 227, 98 L.Ed. 654, 74 S.Ct. 450.

Where, as here, appellant contends that the evidence was not sufficient to support the conviction, the appellate court is to treat the basic facts as being those which the jury could have found from the evidence, if every conflict in the testimony had been resolved in favor of the Government. *Todorow v. United States*, 173 F. 2d 439 (C.A. 9, 1949) cert. den. 337 U.S. 925, 93 L.Ed. 733, 69 S.Ct. 1169.

In the instant case, the facts relating to appellant's state of mind in transferring the cash register are as set forth below, if all conflicts in the evidence are resolved against appellants.

They were officers, directors and agents of Edwards Shaver Departments, Inc. During 1952 that corporation had concessions which were operated as the electric razor departments of department stores in Washington, Oregon, and California. The corporation was incorporated under the same name in both Cali-

ifornia and Washington; but the distinct corporate entities were ignored, and both were treated as one corporation by appellants during 1952.

Max T. Edwards also owned two corporations in Vancouver, B. C., Canada. One of them operated a retail cutlery store and the other a retail electric razor store.

In addition to operating the department store concessions, Edwards Shaver Departments, Inc. had its own store in Seattle. Money and merchandise was freely exchanged between the various retail outlets in British Columbia, Washington, Oregon and California. They were all part of the same chain.

A large volume of business was done, but the corporation lost money. It was obligated by contracts to operate many concessions which were not profitable, as well as some that were. As of the end of 1952, it had a lease requiring it to pay \$500.00 per month rent for three years upon the space occupied by the store in Seattle, although that store was not profitable.

The only way the corporation could operate at a profit was for it to either arrange some way of getting a higher percentage of profit in the department store concessions, or eliminate the unprofitable locations. Neither alternative was open to Edwards Shaver Departments, Inc., because of its obligations under written contracts.

During 1951 and 1952, the business in the United States had continued to exist only by reason of the fact,

among others, that certain wholesalers of electric razors had supplied merchandise, in quantity, on long term credit. Such credit was not available for purchases by Edwards Shaver Departments, Inc. after 1952.

As of the end of 1952, Edwards Shaver Departments Inc., had assets with a book value of approximately \$60,000.00 and a liquidation value that was only a fraction of \$60,000.00. At the same time it owed its creditors, other than Max T. Edwards, approximately \$123,000.00. At the beginning of December of 1952 it also owed Max T. Edwards nearly \$35,000.00.

At that time there was no possibility that the corporation could continue with business as it had done in the past. Unless the creditors voluntarily canceled the largest part of the obligations of the corporation and the department stores made new concession arrangements, allowing the corporation to operate at a profit, bankruptcy was certain. The inevitable insolvency proceedings could not be under state law because the commingling of the assets and liabilities of the Washington and California corporations prevented any effective liquidation under state laws.

Appellants had acquired the "know-how" to operate department store shaver concessions profitably, but could not do so with Edwards Shaver Departments, Inc. It was hopelessly encumbered with bad contracts and large debts. Appellants wanted to rid themselves of the contracts and debts and start over with a new

corporation. They attempted to do just that, beginning in December of 1952.

Appellants asked for, and received, advance payments of money earned by the concessions, but not due and payable from the department stores until January 10, 1953. They then caused \$36,500.00 to be transferred to Max T. Edwards and his corporations in Canada. That was more than full repayment of money he had loaned to Edwards Shaver Departments, Inc.

Having caused the debt to Max T. Edwards to be paid in full, appellants, on February 17, 1953, sent letters to the other major creditors advising them that they would have to wait for their money.

On the same day an order was placed with a moving company for shipment of the better furniture and the cash register from the store in Seattle to one of the Max T. Edwards corporations in Canada. On February 20, 1953, the moving company received the cash register and the furniture from the Seattle store, and started it on its way to Canada.

On February 25, 1953 Max T. Edwards advised the controller of the largest creditor that appellants were not interested in any arrangements which did not involve a cancelation of seventy-five per cent of the indebtedness of Edwards Shaver Departments, Inc., and long term arrangements for payment of the balance. On February 27, 1953, Max T. Edwards requested a representative of one of the California cred-

itors to try to hold another California creditor in line so that it would not throw Edwards Shaver Departments, Inc. into some sort of insolvency proceedings.

The latter creditor had been corresponding with Edwards Shaver Departments, Inc. for some time in an attempt to collect its account, but the correspondence was kept by appellants and never produced either for the receiver, the trustee, or for the jury in the criminal trial. Max T. Edwards falsely testified at the trial that he never expected legal action by that creditor.

The attachment by that creditor of California assets of Edwards Shaver Departments, on February 27, 1953, precipitated bankruptcy. The California bankruptcy occurred in March of 1953. The Washington bankruptcy was deferred until May 7, 1953, because of the intervening appointment of a State receiver. That state officer soon discovered that the past operation of the Washington and California corporations as one corporation mandated federal bankruptcy. On his recommendation, a petition for involuntary bankruptcy was filed in Washington and was followed by a transfer of all assets of the bankruptcy in California to the bankruptcy trustee in Washington.

During 1952 Edwards Shaver Departments, Inc., had explained losses of \$30,000.00 and additional large losses which were not explained by appellants. The unexplained losses resulted from shipments of electric razors to one of the Vancouver corporations. Records

of such shipments were made and kept in Seattle. They covered many shipments of large quantities of valuable electric razors, but all such records were removed by appellants from the files of the corporation before the receiver took over.

Appellants falsely testified at the trial that the value of shavers sent to Canada was less than the value of cutlery shipped from Canada to Seattle in an exchange of merchandise between the various Max T. Edwards' corporations.

Two days before the cash register was picked up by the moving company for transfer to Canada, appellants caused a certificate of incorporation be filed for Shaver Raids, Inc., with the Secretary of State, Nevada. It was their intention to take over the profitable concessions in the name of Shaver Raids, Inc., free of the old obligations of Edwards Shaver Departments, Inc., after the latter went through bankruptcy. Money for Shaver Raids, Inc., came from the bank account of Edwards Shaver Departments, Inc. With their "know how" in the retail electric shaver business, appellants were in a favorable position to make such arrangements with the department stores and then buy up the assets of the bankrupt at distress sale. That was their intention.

Shaver Raids, Inc., succeeded in doing just that with respect to the profitable Seattle concession, but was unsuccessful in attempts to obtain the profitable California concessions.

Appellants pretended to the creditors and to the department stores that it was necessary to withdraw money to Canada to repay obligations to banks, but not all of the money so withdrawn was used for that purpose. The proceeds of some of the money was still in the possession of Max T. Edwards after May 7, 1953 when both corporations were bankrupt, but he did not turn such proceeds, and other property of the bankrupt, over to the trustee.

The appellants have kept, and used as their own, property of the bankrupt including the cash register, furniture, trade names, an adding machine and records relating to concession possibilities in other department stores.

Appellants falsely testified at the trial that the reason the cash register was shipped to Canada was that the store was being closed, and that there was no further use for the cash register in the United States.

* * * * *

There is, of course, much evidence in the record which is contrary to what has been said above concerning the circumstantial evidence of appellant's state of mind on February 20, 1953, when the cash register was transferred to Canada. Yet, as appears from the detailed references to the evidence at the trial, at pages 1 - 33 of this brief, there was evidence from which the jury could have found the facts to be as above set forth. If every conflict in the testimony had been resolved in favor of the appellee the

jury would have so found. We submit that the evidence, as so construed, is susceptible of only one hypothesis with relation to appellants' state of mind. They knowingly and fraudulently transferred the cash register to Canada in contemplation of a bankruptcy proceeding against Edwards Shaver Departments, Inc.

POINT II

IF THERE WAS NO PREJUDICIAL ERROR AS TO COUNT XIX, ALLEGED ERROR AS TO OTHER COUNTS WOULD NOT REQUIRE REVERSAL

The sentences imposed on other counts were concurrent with that fixed as punishment for the fraudulent transfer of the cash register charged in Count XIX. If this court decides that the conviction on Count XIX should be affirmed, it need not consider objections raised by appellants in relation to their conviction on other counts in the indictment.

Fisher v. United States, 254 F. 2d 302, 304 (C.A. 9, 1958);

Kiyoshi Hirabayashi v. United States, 1943, 320 U.S. 81, 85, 105, 63 S.Ct. 1375, 87 L.Ed. 1774;

Pinkerton v. United States, 1946, 328 U.S. 640, 641 - 642 note 1, 66 S.Ct. 1180, 90 L.Ed. 1489;

Lawn v. United States, 1957, 355 U.S. 339, 359, 2 L.Ed. 2d 321, 78 S.Ct. 311.

Even if improper testimony had been admitted in support of the charges made in other counts, such facts would not require reversal. This is true with respect both to the counts resulting in concurrent sentences

and to those on which the jury found appellants not guilty. *Blassingame v. United States*, 254 F. 2d 309 (C.A. 9, 1958). But in any event there was no evidence admitted at the trial which was not properly before the jury with relation to appellants' state of mind when they transferred the cash register.

POINT III

CONVICTIONS ON THE REMAINING COUNTS WERE PROPER IN ANY EVENT

The remaining counts charged concealment, after bankruptcy, of sums of money and of the cash register by both appellants and similar concealment of an adding machine by Gilbert Edwards. The possibility that such concealment may constitute a single transaction rather than multiple offenses, does not justify reversal of any of the concurrent sentences. *Fisher v. United States*, *supra*, 254 F. 2d 302, 304 (C.A. 9, 1958).

The concealment was unlawful if it was one offense or several. Appellants were officers and directors of an insolvent Washington corporation. As such they were fiduciaries charged with the conservation of its assets. *Larsen v. A. W. Larson Const. Co.*, 36 Wn. (2d) 271, 281 (1950). Those assets were a trust fund for all creditors and no creditor was entitled to preference over any other. *Terhune v. Weise*, 132 Wn. 208, 211 (1925).

Appellants violated their fiduciary duties by preferring Max T. Edwards over other creditors and by

transferring part of the property of that trust to themselves. Except insofar as the rights of innocent third parties intervened, the property so transferred remained that of the trust. *Mid-State Insurance Co. v. American Fidelity & Casualty Co.*, 234 F. 2d 721, 727 (C.A. 9, 1956).

Some of the property may have been converted into another form (e.g., the \$10,000 note from Mrs. Edwards to Max T. Edwards) but that does not affect the rights of the trust. *City of Spokane v. First National Bank of Spokane, et al*, 68 Fed. 982 (C.A. 9, 1895).

When the petitions in bankruptcy were filed, the trust fund, consisting of all of the assets of the insolvent corporation, became property of the bankrupt. Those assets included the property wrongfully transferred by the fiduciaries to themselves and the proceeds of such property remaining in their possession or under their control. *United States v. Shireson*, 116 F. 2d 881, 883 (C.A. 3, 1940), 132 A.L.R. 1157.

Appellants in keeping those assets beyond the jurisdiction of the bankruptcy court were "concealing" property "belonging to the estate of a bankrupt," although the creditors and trustee soon learned of the fraud and despite the action of the trustee in starting suit in a Canadian Court to recover the assets removed from the jurisdiction of the bankruptcy court. *United States v. Zimmerman*, 158 F. 2d 559, 560-561 (C.A. 7, 1946).

Appellee is aware of the decision of the Sixth Circuit in *Levinson v. United States*, 47 F. 2d 451, and that of the Second Circuit in *United States v. Alper*, 156 F. 2d 222. At first reading it would appear that those cases are authority for the proposition that appellants could not be guilty of those counts which charged concealment of the money which was paid to Max T. Edwards as a preference.

Certainly the decisions do not bear upon appellant's guilt in concealing the cash register or the offense of Gilbert Edwards in concealing the adding machine. Nor, in fact, do they provide any real guide in determining if the convictions for concealing the money should be affirmed.

Neither *Alper* nor *Levinson* involved a fraudulent transfer by directors of an insolvent corporation in the State of Washington, with its strictly applied trust fund theory of corporate assets. *Terhune v. Weise*, *supra* (132 Wn. 208, 211). In the instant case the law prevented the change of ownership which could have occurred in *Alper* and in *Levinson*.

Nor are those decisions so well reasoned that they should be followed by this court, even if the facts were similar. They encourage the kind of fraud which Congress by repeated amendments of the penal laws, relating to bankruptcy, has attempted to prevent. *Collier on Bankruptcy*, 14 Ed., § 29, pages 1144-1145. It is all too easy for a dishonest business man to have the books of his corporation show obligations of one

kind or another to him. If he could then pay those "debts" to himself as a mere preference with no fear of criminal sanctions for thereafter hiding the money from the creditors, much of the value of 18 U.S.C. § 152 would be destroyed. A rule that money paid in fraudulent preference cannot be criminally concealed constitutes an invitation to the introduction of a variety of such fraudulent schemes into the commerce of the nation.

Appellants cite many cases holding that the type of concealment with which they have been charged must be from the trustee. Those cases correctly interpret the law as it existed prior to the enactment of the Chandler Act of 1938. Subdivision 1 of § 29 of the Bankruptcy Law of 1898 prohibited concealment from the trustee or other court officer charged with the care of the assets of a bankrupt. The 1938 amendment added, as a new crime, the similar concealment from creditors in any bankruptcy proceedings.

Some cases decided after the 1938 amendment consider offenses committed earlier, and others construe indictments charging concealment "from the trustee."

In the instant suit the Government did not allege or prove the date of the appointment of the trustee in the Washington bankruptcy proceedings. It proved that the bankruptcy occurred in California in March of 1953; that a bankruptcy receiver was appointed in

a State Court receiver, and that it therefore was not property of the bankrupt on May 7, 1953 or thereafter.

The jury's verdict with relation to Count XIX established that the same cash register was fraudulently transferred before the receiver was appointed. That fraudulent transfer was to Edwards, Ltd., a Canadian corporation owned by Max T. Edwards. A fraudulent transfer is not a sale. No rights of innocent third parties were involved so the cash register continued to be part of the trust fund, consisting of all of the assets of the insolvent, until the receiver was appointed. On and after May 7, 1953 the cash register was an asset of the bankrupt, not property of Max T. Edwards' corporation in Canada.⁴

It also appears that the jury was not required, under the evidence, to find that Edwards, Ltd. had any title to, or interest in, the cash register. Appellants testified that Max T. Edwards had the cash register at all times and that either of them could have produced it. If they did not mean what they said under oath, it was up to their counsel to show the error. The suggestion on page 37 of appellants' brief that the Government should have pursued the matter further apparently ignores the fact that appellants were represented at the trial by able and experienced trial counsel of their own selection.

⁴The reference to full disclosure at page 33 of the brief of appellants is somewhat hard to understand in view of the earlier concession (at page 16) that there were no book entries showing the transfer of the cash register.

At page 38 of that brief there is a statement that a particular kind of instruction should have been given, and that the court's failure to give that instruction "constituted a fatal and prejudicial factor in bringing about a verdict of guilty." Appellants did not request such an instruction or take exception to the omission. (R. 25-30, 815-816).

Appellants, at pages 38-39 of their brief, urge that there could be no criminal concealment of the cash register from the trustee because there is no proof of the date of his appointment. The position of appellee that concealment from either the California receiver, the Washington trustee or the creditors is all that 18 U.S.C. § 152 requires is covered by other parts of this brief.

So far as concealment of the cash register is concerned the precise date of appointment of the Washington trustee appears completely immaterial. He sued appellants in Canada while Max T. Edwards admittedly still had the cash register and was still willing to return it to Gilbert Edwards if the latter had asked for its return.

Brief of Appellants, pp. 39 - 40

The argument of appellant, Gilbert Edwards, at pages 39-40 of appellants' brief takes no account of the following facts. Max T. Edwards testified that he would return the adding machine at any time that Gilbert requested it. The record does not disclose

any payment to the insolvent or to any receiver or trustee for the adding machine. There was evidence from which the jury could determine that Gilbert Edwards was a principal or accessory in concealment of the adding machine, after appellants had jointly and fraudulently taken it from the insolvent corporation. Gilbert Edwards admitted taking the machine and the jury had only appellants' words to support a claim that Gilbert Edwards did not have physical possession on and after May 7, 1953.

Brief of Appellants, pp. 40 - 43

The Government concedes that there could have been no concealment on and after May 7, 1953 if none of the assets, or the proceeds of them, then were in the possession of, or available to, the appellants. Both the California and the Washington corporations had become bankrupt by May 7, 1953. 18 U.S.C. § 151. But the date of the appointment of the trustee is not important. The proof clearly showed that there were creditors. The indictment charged concealment from creditors.

If the date of the appointment of a trustee were important, appellant could not benefit from the government's failure to prove the date of appointment of the trustee in Washington. The proof showed that a Federal bankruptcy custodian was appointed on March 27, 1953 in the California bankruptcy of Edwards Shaver Departments, Inc.

The proof further showed that the adding ma-

chine and the cash register were still in the possession and control of appellants on and after May 7, 1953.

Even if the jury believed appellants' testimony about large sums of money being paid to banks and otherwise spent before May 7, 1953, they were nevertheless bound to consider the admission of Max T. Edwards that on May 7, 1953 he had a \$10,000 note from Mrs. Edwards which had been given to him in exchange for part of the money taken from Edwards Shaver Departments, Inc.

The jury also heard the admission of Gilbert Edwards that he, at the time of trial, still had the Bon Marche concession in the name of Shaver Raids, Inc. That corporation was set up with money taken from the bank account of Edwards Shaver Departments, Inc. and charged in its books as a miscellaneous expense.

Brief of Appellants, pp. 43 - 46

It is unnecessary to argue the presumption of continued possession in view of admissions that the cash register, the adding machine and the \$10,000 note were still in possession of appellants on and after May 7, 1953. It is noted that the decision of the Supreme Court, relied on by appellants (page 43 of their brief), supports the Government's contention that the jury might properly infer that \$36,500 was not spent in about four months. See *Maggio v. Zeitz*, 333 U.S. 56, 65-66, 92 L.Ed. 476, 68 S.Ct. 401.

The statements on pages 44 and 45 of appellants' brief to the effect that the Government's own evidence showed that the Seattle store was to be closed, should not go unchallenged. A witness produced by the government testified that appellants planned to sell or close that store (R. 318-319). That was not "the government's own evidence." It was new matter gone into on cross-examination, by appellants' trial counsel, of an accountant who worked for Edwards Shaver Departments, Inc. and later assisted all parties to prepare the case for trial (R. 95). As appears from Point I of this brief, the government's evidence was that the store would not be closed while the rental of \$500 per month continued to be payable.

Brief of Appellants. pp. 46 - 51

On the evidence adduced at the trial any question as to a possibility that the concealment of assets of the bankrupt was done in good faith, was for the jury.

The cash register and the adding machine were concealed in a typical manner. They were taken away before bankruptcy and no record was left to indicate their absence. A more sophisticated concealment was practiced by appellants with regard to the money. They removed it beyond the jurisdiction of the bankruptcy court and then contended that the bankrupt had no rights with reference to it. Both types come within the prohibition of the statute. It is the fact, not the mode of concealment, which is important.

U. S. v. Zimmerman, supra, 158 F. 2d 559 (C.A. 7, 1946);

U. S. v. Schireson, supra, 116 F. 2d 881, 883 (C.A. 3, 1940);

U. S. v. Switzer, 252 F. 2d 139, 142 (C.A. 2, 1958), cert. den. 357 U.S. 922, 2 L.Ed. 2d 1366, 78 S.Ct. 1363.

The statement on page 48 of appellants' brief, that the trustee did not communicate with Max T. Edwards, is not substantiated by the record. It is true that Max T. Edwards testified that he had no recollection as to whether he had correspondence from the trustee and referred it to his counsel, but Max T. Edwards did admit that he was sued by the trustee in Canada.

Such communication was not a necessary part of the government's proof. The law does not require the trustee, or anyone else, to demand the return of property of the bankrupt which is being unlawfully concealed.

U. S. v. Wodiska, supra, 147 F. 2d 38, 39 (C.A. 2, 1945);

U. S. v. Comstock, 161 Fed. 644 (D.C. R.I., 1908).

At pages 49-50 of appellants' brief some older cases are cited in support of a statement that the crime of concealment in bankruptcy requires such concealment "during the whole course of the bankruptcy proceedings." The government's position that under the present statute the concealment need only be after the bankruptcy occurs, and need not even continue until the trustee is appointed, has been set forth earlier in this brief. It will not be reargued here. We now mere-

ly dispute the claim that concealment must continue until the bankruptcy proceedings are terminated. The most recent of the old cases cited by appellant in support of that proposition is *Gretsch v. United States*, 231 Fed. 67 (C.A. 3, 1916). That case has been expressly overruled. *United States v. Schireson*, *supra*, 116 F. 2d 881, 884 (C.A. 3, 1940). If continuing concealment was ever a prerequisite to prosecution, it is clear that the requirement does not exist under the more modern statutes.

Collier on Bankruptcy, 14th Edition, § 29, pp. 1152-1153;

U. S. v. Weinbren, 121 F. ^{2d} 826, 827-828 (C.A. 2, 1941).
^

Brief of Appellants, pp. 51 - 57

Appellants' arguments as to the evidence concerning the fraudulent transfer of the cash register charged in Count XIX, will not be answered at this point in this brief. The government's position on that has been detailed in Point I of this brief. Yet, since we contend that the question was for the jury, it is appropriate to point out exactly what the Supreme Court said about contemplation of bankruptcy in *Conrad, Rubin and Lesser v. Pender*. That case is relied upon by appellants and cited at page 53 of their brief. The Supreme Court there held (289 U.S. 472, 478-479, 77 L.Ed. 1327, 53 S.Ct. 703):

"But it is insisted, in the instant case, that the payment to appellants could not properly be regard-

ed as made in contemplation of bankruptcy, and hence within the jurisdiction to reexamine, because the payment was for the purpose of engaging appellants to conduct negotiations with creditors in order to arrange for an extension of time, and, if necessary, for the operation of the business under the creditors' supervision, and thus to avoid a forced liquidation and ultimately to restore the business to a sound basis. We find no ground for saying that the fact that such purposes were in view establishes, as matter of law, that the payment was not in contemplation of bankruptcy. On the contrary, negotiations to prevent bankruptcy may demonstrate that the thought of bankruptcy was the impelling cause of the payment. 'A man is usually very much in contemplation of a result which he employs counsel to avoid.' *Furth v. Stahl*, supra. See also, *In re Klein-Moffett Co.*, 27 F. (2d) 444; *Slattery v. Dillion*, 17 F. (2d) 347; *In re Lang*, 20 F. (2d) 239."

We agree that appellants could not be guilty of the charge in Count XIX of fraudulently transferring the cash register if they acted in good faith with an honest belief that what they were doing was right and proper, but dispute their interpretation of the evidence.

The argument at page 54 of their brief to the effect that the government had a burden of showing that appellants knew the contents of the bankruptcy law is not supported in the cases. One of the authorities relied on by appellants is *Babb v. U. S.*, 252 F. 2d 702, 708 (C.A. 5, 1958), cert. den., 356 U.S. 974, 2 L. Ed. 2d 1147, 78 S.Ct. 1137. The defendants in that case argued that the trial court should have charged that the Government had a burden of showing the defendant

knew he was violating a specific law and actually knew the provisions of that law. The court held (page 708), "We do not understand that the principle announced in the Hardgrove and the Yarborough cases goes further so as to require actual knowledge of the provisions of the specific law. (Citing authorities.)"

The record in the instant case discloses ample circumstantial evidence to support the jury's finding that appellants had an intent to defeat the bankruptcy law. Laymen as well as lawyers can be found guilty of the crime.

Brief of Appellants, pp. 57 - 58

Appellants' argument that the government failed to prove venue as to Max T. Edwards appears to be completely answered by Sections 2, 3237 and 3238 of Title 18, U.S.C. Section 2, as applied to the evidence in this case, makes Max T. Edwards punishable as a principal or accessory for those parts of the crime which were physically done in Seattle, Washington by Gilbert Edwards, his accomplice. Section 3237 permits prosecution in any of the districts when an offense is begun in one district and completed in another, or is committed in more than one district. Section 3238 permits prosecution in the district where the offender is found if the offense is committed out of the jurisdiction of any particular state or district. See also,

U. S. v. Schireson, supra, 116 F. 2d 881 (C.A. 3, 1940);

U. S. v. Greenstein, 153 F. 2d 550, 551 (C.A. 2, 1946) ;

U. S. v. Knickerbocker Fur Coat Co., *supra*, 66 F. 2d 388 (C.A. 2, 1933), cert. den., 290 U.S. 673, 78 L.Ed 581, 54 S.Ct. 91 ;

U. S. v. Olweiss, 138 F. 2d 798, 799-800 (C.A. 2, 1943), cert. den., 321 U.S. 744, 88 L.Ed. 1047, 64 S.Ct. 483.

Brief of Appellants, pp. 62 - 64

The government's position in regard to the matters covered by appellants' specifications of error No. 4, argued at pages 62-64 of their brief, has been set forth in Point II of this brief.

Brief of Appellants, pp. 65 - 66

Specification of error No. 5 concerns admission of Exhibit 24, a letter from Max T. Edwards to the Washington State Court receiver, demanding a return of records of "my California corporation (Edwards Shaver Departments, Inc.)". It was properly admitted as tending to show intent in doing the acts charged in the indictment. The Washington and California corporations had been operated as one. There was convincing evidence that appellants' planned to take over the profitable concessions of Edwards Shaver Departments, Inc., free of the debts and bad contracts of that corporation. Records of the California portion of Edwards Shaver Departments, Inc. would have had no value to appellants except in attempting to carry out that scheme. The California corporate assets had been attached at an earlier date and a California bank-

ruptcy receiver of Edwards Shaver Departments, Inc. was appointed on the very day that Exhibit 24 was sent to the State Court receiver in Washington.

Brief of Appellants, pp. 66 - 68

Specification of error No. 6 concerns admission of Plaintiff's Exhibit No. 12, a check of Edwards Shaver Departments, Inc. to Gilbert Edwards in the sum of \$2,000.00, dated February 12, 1953 and signed by Max T. Edwards. The government proved that such \$2,000.00 payment was entered in the records of Edwards Shaver Departments, Inc. as a miscellaneous disbursement and that it was used to set up Shaver-aids, Inc. That was the corporate vehicle which appellants hoped to use in taking over the profitable part of the shaver concession business free of the bad contracts and the large financial burdens of Edwards Shaver Departments, Inc. Can it be seriously contended that proof of such a payment was not competent evidence of appellants' respective states of mind in doing the things charged in the indictment?

There is an additional reason why the exhibit was properly admitted in evidence. We do not find in pages 66-68 of appellants' brief, or elsewhere in their brief or in the record, any explanation as to why Gilbert Edwards never repaid \$200.00 to any receiver or trustee. If, as appellants claim, the \$2,000.00 covered by Exhibit 12 was a repayment of \$1800.00 owed to Gilbert Edwards by the corporation and an advance of \$200.000, the \$200.00 should have been repaid. Ex-

hibit 12 therefore showed another fraud, similar to those charged in the indictment. *McCoy v. United States, supra*, 169 F. 2d 776, 783 (C.A. 9, 1948).

Brief of Appellants, pp. 68 - 69

Specification of error No. 7 concerns proof that Shaver Raids, Inc. actually purchased the assets of the Seattle concession. It was, we submit, properly admitted as proof of appellants' intent. It was direct evidence of an intention which the Government claimed the appellant had in transferring the cash register; i.e., an intention to operate the profitable concession by Shaver Raids, Inc., free of the debts and contracts of the old corporation.

Brief of Appellants, pp. 69 - 70

Specification of error No. 8 concerns admission of evidence that the general creditors, other than Max T. Edwards and Gilbert Edwards, received less than 17 percent of the amount of their proven claims.

Presumptively, the amount paid represented the proportionate share of each creditor in the liquidation value of the assets of Edwards Shaver Departments, Inc. It was the best evidence of such relationship between the amount Edwards Shaver Departments, Inc. owed to all of its creditors and the amount which could be paid to such creditors as the result of a forced sale of the assets.

Appellants were more familiar with their corporation than was anyone else. If they believed that the

percentage paid was not the proper one, they could have so testified. We find no such testimony in the record.

There was no better, or fairer, way of demonstrating to the jury just what appellants expected they would receive from Edwards Shaver Departments, Inc., if they had lived up to their fiduciary obligations and took their turn with the other creditors in receiving a fair share of the assets of the insolvent. Having that in mind, they elected to ignore their duty as fiduciaries and pay themselves in full. The evidence, therefore, was material on the issues of intent raised by the pleas of not guilty to each of the counts in the indictment.

Brief of Appellants, pp. 70 - 72

Specification of error No. 9 concerns the court's refusal to admit Exhibit A-22, a tabulation by Max T. Edwards of his claims concerning money spent by him after withdrawing \$36,500.00 from Edwards Shaver Departments, Inc. in December of 1952 and January of 1953. Appellants argue, and we concede, that the court had discretion to admit such a summary. Apparently, that was the court's view, also. The trial Judge ruled (R. 501), "Summaries by accountants, or by parties who are not witnesses, are not as a matter of right, admissible." That should end the matter, as there is no appeal from a discretionary ruling.

The trial Judge's subsequent statement (R. 501): "The Court has no right, I do not believe, to admit it over objection", must be read in context. That includes the concessions of Government counsel which are indicated only by asterisks in the long quotation appearing at pages 23-24 of appellants' brief. He said: "I have no objection, your Honor, if the witness uses it to refresh his recollection, so long as it is not considered a paper in evidence." Government counsel later stated, "Your Honor, may I interrupt for a moment to make a suggestion? I will withdraw any objection to this going into evidence if it is stipulated that the lack of objection on the part of the Government is not to be construed as any concession that the paper is either complete or accurate."

Appellants' counsel refused to so stipulate and the court finally refused to admit the exhibit. It is printed as Appendix "B" to appellants' brief. After reviewing it, this court may conclude that in any event the exhibit would have confused, rather than aided, the jury.

Brief of Appellants, pp. 72 - 76

Specification of error No. 10, concerns the trial court's denial of motions for a new trial. It is supported by arguments that the sentences were severe and that the trial court did *not* give the jury instructions which were *not* requested by either party. It appears that neither the exception nor the arguments

are properly before this court. They were all matters for the trial court.

None of the alleged omissions in the instructions are such that the court was required to give them in the absence of a request, even if one or more of them might have been proper in the event of a timely request. In fact, appellants now contend that the trial court, without any request, was required to instruct the jury that the defendants should have been found not guilty if they had been acting on advice of an attorney. At pages 73-74 of their brief they urge reversal because the trial court did not instruct the jury to acquit if appellants acted on the advice of counsel. At pages 54-55 of their brief they contend that they did not have any such advice.

CONCLUSION

Appellants were clearly guilty of fraudulently transferring the cash register with intent to defeat the bankruptcy law. There was no error requiring reversal of their conviction of that crime. That conviction, standing alone, warrants affirmance without consideration of their guilt of other charges in the indictment. Yet, they were guilty of the other charges. They concealed the adding machine after both of their corporations became bankrupt. They similarly concealed money which had been fraudulently taken from the corporation before bankruptcy. Gilbert Edwards, alone, was also guilty of concealing, after bankruptcy, an adding machine which he fraudulently took from the corporation in contemplation of that bankruptcy. The judgments should be affirmed in all respects.

Respectfully submitted,

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Attorneys for Appellee

APPENDIX "A"

1952 SALES AND EXPENSES OF SEATTLE STORE

	TOTAL SALES	SALES TAX	FEDERAL TAX	SHAVER SALES	ACCESSORIES	REPAIRS	PRODUCTS	MISC.	CUTLERY	CHINA	LEATHER	GRIND'G
JANUARY	\$3,465.69	\$ 96.17	\$ 8.10	\$1,219.45	\$734.11	\$1,001.54	\$186.45	\$126.87	\$81.05	\$11.95		
FEBRUARY	3,033.23	82.33	5.11	985.98	645.64	923.16	134.52	144.74	95.90	15.85		
MARCH	3,000.87	85.53	7.10	947.67	717.05	768.21	157.26	172.35	120.65	25.05		
APRIL	3,310.94	92.88	7.60	1,186.09	860.16	566.31	146.78	347.91	95.31	7.90		
MAY	3,592.22	103.03	8.00	1,425.61	793.05	631.77	174.40	306.17	108.19	22.55	\$19.45	
JUNE	3,605.14	99.06	10.15	1,371.42	649.37	709.40	153.37	238.01	337.13	12.95	22.33	\$ 1.95
JULY	3,895.93	111.26	11.50	1,315.90	734.60	770.75	190.29	380.55	341.09	7.95	19.98	11.45
AUGUST	4,651.32	132.13	6.36	1,410.33	779.81	889.63	211.53	737.50	493.31	3.50		22.04
SEPTEMBER	4,458.53	128.94	8.30	1,458.15	741.94	907.04	251.17	379.25	541.59	26.35		15.80
OCTOBER	4,337.79	122.23	9.44	1,330.53	893.83	701.88	209.40	469.83	563.07	22.40		15.18
NOVEMBER	3,555.53	102.50	10.42	928.99	709.51	655.12	148.67	322.96	569.78	97.43	4.95	5.20
DECEMBER	8,494.47	238.28	29.98	2,459.84	936.06	778.18	231.57	1,088.23	1,990.97	670.73	65.88	4.75
TOTALS	\$49,401.66	\$1,394.34	\$122.06	\$16,039.96	\$9,195.13	\$9,302.99	\$2,195.41	\$4,714.37	\$5,338.04	\$924.61	\$132.59	\$76.37

Total Sales less total Taxes — \$47,885.26.

Gross Profit computed at 47.50% of Net Sales excluding Taxes (R. 609) — \$22,745.50.

Gross Profit computed by allowing 90% profit on Repairs (R. 690-691), 60% on Products (R. 551, 710) and 40% on all other Net Sales excluding Taxes (R. 551, 687) — \$24,258.37.

Total Operating Expense exclusive of Rent (R. 609-611) — \$18,000.00.

Rent payable under lease in any event if store closed or kept open (R. 608-609) — \$6,000.00.

No. 16057

United States Court of Appeals
For the Ninth Circuit

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VS.

UNITED STATES OF AMERICA, *Appellee*.

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NORTHERN DIVISION

APPELLANTS' REPLY BRIEF

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REFERENCES IN REPLY BRIEF

“App. Br.” means Brief of Appellants

“Br.” means Brief of Appellee

United States Court of Appeals

For the Ninth Circuit

MAX T. EDWARDS and GILBERT EDWARDS,	}	No. 16057
<i>Appellants,</i>		
vs.		
UNITED STATES OF AMERICA,	<i>Appellee.</i>	

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

APPELLANTS' REPLY BRIEF

I. PRELIMINARY OBSERVATIONS

An evaluation of appellee's contentions suggests the propriety of the following observations:

(1) The accuracy of appellants' statement of the case included in App. Br. 1-30 is not challenged; (2) appellee's statement of the case is inadequate and defective because (a) material matters are ignored and corporate entities such as Edwards, Ltd., or Shaveroids, Inc., are improperly ignored in describing acts or events, (b) certain statements are unsupported by, and in certain instances, contrary to the record, (c) appellee's summary with respect to Count XIX (Br. 38-45) is, in various respects, inadequate and inaccurate, (d) appellee particularly fails to differentiate between evidence applicable to Gilbert Edwards and evidence applicable to Max T. Edwards in its claim as to what was proved; (3) appellee's basic legal contention is unsound (Reply Br. 9), (4) certain of appellants' contentions are not even discussed; and (5) appellants reiterate

their reliance on cases cited notwithstanding appellee's claim that decisions are in some cases under prior statutes (Br. 36) and reiterate statements criticised by appellee (Br. 51, 52, 56).

In view of space considerations, no attempt is made to point out and discuss all errors contained in appellee's brief. At this point, however, note is made of the following:

II. ERRONEOUS STATEMENTS IN APPELLEE'S BRIEF

1. The claim that the sum of \$2,000 paid to Gilbert Edwards February 25, 1953 (Ex. 12), was charged as a miscellaneous expense when, in fact, it was *not* so charged (R. 147, App. Br. 4-6, 66-68; Br. 22, 62-63).

2. The claim that appellants still had possession of a \$10,000 note from Mrs. Edwards and some money left over from the \$36,500 payments on May 7, 1953, when the facts are to the contrary (R. 621) (See Reply Br. 7) (App. Br. 7-8, 30-32, 43, 47, 48; Br. 12, 14, 44, 47, 55).

3. The claim that there was no intention to close the Seattle store when, in fact, the Government's own witness, Ed Ester, testified on cross-examination to the contrary (R. 319, Br. 29-31, 44, 56; App. Br. 9, 33, 44, 45, 52, 55, 56, 60, 67).

4. The claim that each defendant (without attempt to segregate evidence as to each) planned to take over the profitable part of the business free of bad contracts and debts of Edwards Shaver Departments, Inc., when, in fact, the evidence (consistent with innocence) discloses the innocent character of the incorporation of

Shaveroids, Inc., and Cutlaire, Inc. (on February 9, 1953, not, as appellee states, February 18, 1953 (Br. 28)) and the normal efforts of the receiver to sell receivership assets and the normal effort of Shaveroids, Inc., to obtain concessions previously cancelled as against the corporation involved (Br. 21, 22, 40, 41, 43; App. Br. 4, 5, 66, 68, 69).

5. The so-called unexplained shrinkage in assets in 1952 (R. 749) as being due to shipments to Canadian corporations when there is no evidence to that effect, the evidence being that shipments were made, were charged for on a contra account basis (records having always been maintained in Vancouver (R. 525, 756) and Edwards Shaver Electric, Inc., was still indebted to the Canadian corporations at the end of 1952 and at the end of January, 1953 (Br. 18, 39, 42, 43; App. Br. 8-9) (See Reply Br. 15, *infra*).

6. The adverse inferences (as to the nature of the suit involved) sought to be drawn from the \$10,000 settlement (Ex. A-29—mutual release precluding the filing of creditors' claims (R. 616) by appellants and others or by the Trustee against appellants and others) (Br. 62) when there is no evidence as to what the complaint covered, or might have covered, *e.g.*, recovery of unlawful preferences (Br. 11, 14, 62-63; App. Br. 13).

7. Claimed false testimony on the part of the appellants when the matter involved, *if* erroneous, could also or as easily be explained as an inadvertence, or an honest mistake committed in the course of interrogation on the stand, and, in any case, not as to a controlling matter on this appeal.¹

¹The jury rejected the charges of fraudulent conspiracy and fraudulent transfer (Counts I, II, IV, V, VII, VIII, X, XI, XIII, XIV, XVI, XVII).

The writer of appellee's brief has also made many mistakes—some quite serious—notwithstanding a more leisurely opportunity to avoid them, in the fifty days of preparation from a study of the record (See also Reply Br. 13-20) (Br. 13, *Cf.*, R. 622; 31, 32, 42, 43, 57, 22, 44, 55); yet we make no claim of falsity—merely error. Furthermore, we are not weighing evidence. App. Br. 29 states:

“Accordingly, defendants’ evidence will be relied upon—not to enable the court to weigh conflicting evidence—but rather to show that the government’s circumstantial evidence relied on to show the elements of ‘knowing and fraudulent,’ ‘contemplation of bankruptcy’ and ‘intent to defeat the bankruptcy laws’ did *not* negative the innocent character of such circumstantial evidence because of the possible and probable character of such innocence as shown by the defendants’ evidence as to what actually transpired. Such a showing will be made to support the defendants’ contention that the government failed to establish evidence of guilt, and judgment of acquittal should now be ordered.”

This approach is consistent with and in conformity to the approach taken by *Karn v. United States* (9 Cir.) 158 F.2d 568 (Reply Br. 21), and cases relied on by appellee (Br. 37-38).

APPELLEE’S CONTENTIONS EVALUATED

Specifications of Error 1, 2, 3 and 10

Appellee makes three principal contentions:

I. That the evidence is sufficient as to all counts; II. That if the evidence is sufficient as to Count XIX, judgment should be affirmed as to all counts; and III.

That as to Max T. Edwards the place of the crime was proved as laid.

Point I.

This is not a case of concealment predicated upon unlawful withholding of information concerning the moneys and property described in the Indictment (App. Br. 46-50). Appellee does not claim that it proved ignorance by the trustee or creditors of the material facts involved (App. Br. 12-16; Br. 56-58).

Appellee does not dispute the correctness or applicability of the legal principle (App. Br. 7-8, 30-32, 43, 47, 48) that unless the respective defendants had possession or control of at least part of the money or property described in the concealment counts (III, VI, IX, XII, XV, XVIII, XX, XXI) on May 7, 1953, or thereafter, defendants would not be guilty of the respective concealments charged (App. Br. 30-46) from the trustee (the date of whose appointment was admittedly not shown)² or from creditors in a bankruptcy proceeding.³ Appellee contends, however, that such possession and

² Appellee mistakenly stated below in its interrogation of Max T. Edwards that the Trustee was appointed May 7, 1953 (R. 604), and the District Court erroneously instructed the jury that the trustee was appointed on that date (R. 806-7). This was prejudicial (App. Br. 40; Reply Br. 27).

³ Concealment must be from "creditors in any bankruptcy proceeding." This means creditors *after*, not before, the filing of the bankruptcy petition. *In re Perkins* (D.N.J.) 40 F.Supp. 114 (1941). The argument as to necessity of possession or control with respect to the Trustee also applies to creditors. Appellee sought conviction on concealment as against the Trustee (R. 169) and appellants' criticism concerning the case made as to the Trustee is still valid. Appellee never proved or even claimed below that there was any concealment from anyone else (R. 169). Now, appellee emphasizes concealment from creditors because of its deficiency of proof as to Trustee, *i.e.*, date of appointment of Trustee and knowledge by appellants thereof. *Rachmil v. United States* (9 Cir.) 43 F.2d 878, 880) (Reply Br. 27).

control were proved, namely, that Max T. Edwards (not Gilbert Edwards) on May 7, 1953, had possession of a \$10,000 note indebtedness from his wife and some money besides derived or left over from the \$36,500 received by him (Reply Br. 7) (Br. 12, 13, 14, 44, 47, 55). This contention is without warrant in the record.

The fact that Max T. Edwards received repayment of his indebtedness was not concealment even though as a result of later events the repayment constituted a preference, and Max T. Edwards was under no obligation to account for his expenditure of said sum (App. Br. 50, 51; Reply Br. p. 10). Title passed and the money received was his. It was not "property belonging to the estate of the bankrupt" on May 7, 1953. 18 U.S.C. Sec. 152.

Appellee contends, however, that the payments were trust fund payments void under the "trust fund" doctrine and that ownership of the money or property was not changed (Br. 48); and that the money or property or the new form thereof (note) was in the possession of Max T. Edwards; and that, therefore, the requirements of possession and control were met. Appellee completely misconceives the law (Reply Br. 10). That appellee is even wrong in its claim as to the facts on this point is also clear.

The record shows that Mrs. Max T. Edwards purchased an apartment house (Harwood Lodge) for the sum of \$45,000 (Ex. A-23) the purchase price being made up partly from a mortgage of \$14,563.48 (R. 505); party from her own lot (R. 506); partly from \$10,000 borrowed by her from the Imperial Bank of Canada (R. 499, 621) on which loan Max T. Edwards became a guarantor (R. 621; App. Br. 8); a 60-day \$5,000 note

payable to the vendor (R. 506, Ex. A-23); a lot belonging to Max T. Edwards (Lot 9, Block 49) for which Mrs. Edwards gave Max T. Edwards a note in the approximate sum of \$5,000 (R. 621, Ex. A-24) and approximately \$10,000 from Max T. Edwards which came from the above-mentioned sum of \$36,500 in repayment of his advances.⁴ This \$10,000 was actually disbursed in two payments, one of \$2,000 (R. 493, Ex. A-18) and one of \$8,000 (R. 498, Ex. A-23). Mrs. Edwards did *not* give Mr. Edwards a note for this \$10,000 (R. 621). When Max T. Edwards testified that on May 7, 1953, he might have had possession of notes totalling \$10,000 (R. 604; Br. 13) he merely meant that he might have had in his custody the \$5,000 note payable in 60 days (and apparently paid and returned) and the \$5,000 note of his wife for his Lot 9, Block 49 (R. 621-622). Accordingly, even prior to the appointment of the receiver on March 11, 1953, the entire sum of \$36,500 had been disbursed and was no longer in the possession or control of Max T. Edwards and, of course, not in the possession or control of Gilbert Edwards.⁵

Appellee claims that Max T. Edwards had some money left on May 7, 1953, out of the \$36,500 relying upon Record 605 (Br. 14). All that Record 605 supports is the statement that Mr. Edwards did not remember how much money he had on May 7, 1953. He was not

⁴ Appellee claims that Max T. Edwards received more than he owed and in January and February, 1953, repaid such excess (Br. 51) Cf. App. Br. 9 (R. 122). Appellee's claim, with which we disagree (Reply Br. 15), makes no difference on this point.

⁵ See Reply Brief 10 pointing out that the payment of \$36,500 did transfer title and that this is not a case of tracing trust assets into other property, the possession of which is sufficient on which to base a charge of concealment. Furthermore, to what count was the claimed \$10,000 note or money applicable?

asked if he had any money left out of the \$36,500 on that date. Had he been asked, his answer under the record would clearly have been that he did not have any left.

So far as concerns the cash register and adding machine, the claim (Br. 12) that R. 533, 741 supports the assertion that "Appellants each testified . . . that the adding machine and the cash register were in the possession or under the control of Max T. Edwards at all times after May 7, 1951," is misleading as stated.⁶ Appellee concedes (Br. 12) that the reference to cash register at R. 533 means adding machine so that neither at R. 533 nor 741 is there testimony that Max T. Edwards or Gilbert Edwards had possession of the cash register.

The evidence is that the cash register was in the possession of Edwards, Ltd., its owner by purchase (App. Br. 32; Br. 12) and that the portable adding machine was not in the possession of Gilbert Edwards after its delivery to Max T. Edwards in February, 1953 (App. Br. 39, 40).

Appellee claims, however, that appellants had control of the cash register and adding machine on May 7, 1953 (Br. 12, 5, 2); but appellee virtually ignores appellants' argument (App. Br. 32-40) showing that neither possession nor control of the cash register was in Max T. Edwards or Gilbert Edwards on May 7, 1953, or there-

⁶Max T. Edwards wasn't charged with concealing the adding machine. The claim that Gilbert Edwards had possession is predicated upon the testimony of Max T. Edwards that he would have returned the adding machine to Gilbert Edwards if he had asked for it (Br. 12, R. 533). There was no evidence that Gilbert Edwards knew this, although he did testify that the cash register and adding machine were "still available in Vancouver on and after May 7, 1953" (R. 741; App. Br. 34). What he obviously meant was that the cash register and adding machine were there and not that he had control over them.

after, and that Gilbert Edwards had no control of the portable adding machine after February, 1953. Appellee claims that if the evidence relied on by appellee (which while relying on language distorts meaning) was incorrect "it was up to their counsel to show error." This we have done by calling attention to other portions of the record (App. Br. 32-40).⁷

Even if appellee proved possession or control, as claimed, there would still be no crime of concealment because the moneys and cash register paid for and transferred were in payment of debts and, at most, constituted a preferential payment recoverable in a plenary suit (App. Br. 50).⁸ Appellee claims that the *Alper* and *Levinson* cases relied on by appellant (App. Br. 50) on this point are distinguishable because of the Washington "trust fund" doctrine, relying upon *Terhune v. Weise*, 132 Wash. 208, 231 Pac. 954.

The jury found that the payment of indebtedness described in the many concealment counts was neither pursuant to a fraudulent conspiracy nor did such payments constitute fraudulent transfers. It should be remembered that a director and officer of a corporation while a fiduciary, is not the trustee of an express trust (*Robinson v. Linfield College*, 42 F.Supp. 147, 155, Affd. (9 Cir.) 136 F.2d 805, cert. den. 320 U.S. 795, 64 S.Ct. 262) and a director and officer who is a sole stock-

⁷The duty of the District Attorney to act impartially and to protect the innocent is well settled. 27 C.J.S. 404, 23 C.J.S. 519. This includes the duty to get at the real facts. *Pell v. State* (Fla.) 122 So. 110, 114.

⁸The trustee instituted suit against the defendants and others, later settled by a payment of \$10,000 (Ex. A-29); but the nature of the suit does not appear from the record. Presumably, it could have included (Reply Br. 3) a claim to recover preference payments made.

holder may be a creditor of his own corporation and treated as such (*Briggs & Co. v. Harper Clay Products Co.*, 150 Wash. 235, 272 Pac. 962). The payment by the corporation of such a creditor even though payment be by an interested director or officer is not void, but, like any other unlawful preference, merely voidable and remains in full force and effect until set aside. *Fleming v. Reinhardt*, 153 Wash. 526, 534, 280 Pac. 9; *McElroy v. Puget Sound National Bank*, 157 Wash. 43, 288 Pac. 241; *Bowyer v. Boss Tweed-Clipper Gold Mines, Inc.*, 195 Wash. 25, 40, 79 P.2d 713; 37 C.J.S. 901.

The "trust fund" doctrine is not to be applied to require the acts of an insolvent corporation still operating to be considered a nullity. Vol. 1, Wash. Law Rev., pp. 81-100, "The 'Trust Fund' Theory: A Study in Psychology." None of appellee's cases support it here. But whatever the "trust fund" doctrine may have been, it was completely abrogated on this point by the enactment in 1941 of R.C.W. 23.48.030 reading as follows:

"23.48.030. *Preference voidable when.* Any preference made or suffered within four months before the date of application for the appointment of a receiver may be avoided and the property or its value recovered by the receiver. No preferences made or suffered prior to such four months' period may be recovered, and all provisions of law or of the trust fund doctrine permitting recovery of any preference made beyond the four months' period are hereby specifically superseded. [1941 c. 103, §3; Rem. Supp. 1941, §5831-6]"

Appellee then claims that the *Alper* and *Levinson* cases are wrong anyway, citing Collier on Bankruptcy, 14th Ed., §29, pp. 1144-1145. Collier doesn't even discuss

this point and Vol. 9 Remington on Bankruptcy, 6th Ed., §3471, cites the rule that an unlawful preference does not constitute concealment without any attempt to criticize the rule. Appellee's argument that the *Alper* and *Levinson* cases would make it all too easy for a dishonest business to pay sham debts as a preference with no fear of criminal sanctions is pointless. The payment of sham debts would be clearly fraudulent. We are here dealing with honest debts and the rule applicable to honest debts. If the payment of \$36,500 and the transfer of the cash register were void acts rather than voidable, they could be ignored and set aside in turn-over proceedings. However, the rule is that preferences and fraudulent transfers are voidable, not void⁹ (Br. 51-52) and can only be set aside in a plenary suit. Collier on Bankruptcy, 14th Ed., §23, p. 502.

There being neither possession nor control of the money or property involved proved in the defendants on May 7, 1953, or thereafter, title having passed thereto in December, 1952, January and February, 1953; and in any case the repayment of the indebtedness to Max T. Edwards and the transfer of the cash register for value being at best mere preferences, the evidence was insufficient to constitute the crime of concealment and the convictions on the counts involved should be set aside.¹⁰

⁹ *Bowyer v. Boss Tweed-Clipper Gold Mines, Inc.*, 195 Wash. 25, 40, 79 P2d 713. Appellee claims that a fraudulent transfer is not a sale. Appellants point out that the sale here is not a fraudulent transfer.

¹⁰ On the issue of the innocent character of the delivery of the portable adding machine by Gilbert Edwards to his brother, Max, in February, 1953 (See App. Br. 45-46) appellee makes no comment.

Point II.

Appellee's principal point of reliance on this appeal is that its circumstantial evidence as to Count XIX requires an affirmance of the judgment of conviction on all counts (App. Br. 51-57, 59-61; Br. 38-44).

In evaluating appellee's statement of what the jury could have found from circumstantial evidence (Br. 15, 38-44), appellee's statement not only fails to demonstrate that such circumstances are "inconsistent with every reasonable hypothesis of innocence" (Reply Br. 4, 21), but fails to demonstrate that the transfer of the cash register was made in contemplation of a bankruptcy proceeding (this was Max T. Edwards' first such experience in America (R. 615)) as distinguished from, at best in contemplation of operation by creditors, assignment for the benefit of creditors or receivership (App. Br. 53) and fails to demonstrate that appellants intended to defeat the bankruptcy law, either by showing that the appellants had knowledge of the contents of that law,¹² or a knowledge of a duty imposed thereby (App. Br. 54-55).

Appellee's statement contains a number of erroneous statements and fails to differentiate between evidence as to Max T. Edwards and evidence as to Gilbert Edwards. Gilbert Edwards was an employee and not a stockholder in the bankrupt corporation. Possible mo-

¹¹ The court instructed (R. 804): "Such contemplation must be of a petition in Federal bankruptcy, and not merely of insolvency, state receivership or arrangement with creditors."

¹² Appellee claims that knowledge of the bankruptcy law is unnecessary. We never contended otherwise, contending, rather, that knowledge of the bankruptcy law *or* knowledge of a duty imposed thereby was necessary (App. Br. 54-55).

tivation or positions taken pertinent to Max T. Edwards wouldn't necessarily apply to Gilbert, and *vice versa*. Yet appellee constantly uses the word "appellants" when, at best, it should indicate which appellant. See also Reply Br. 2, 12, *supra*. We make the following comments (without attempting all corrections) to help preserve proper perspective.

Br. p. 39. The arrangement from the beginning between Edwards Shaver Departments, Inc., and the British Columbia corporations was on a contra account basis (App. Br. 14, 47). Each appellant and the British Columbia corporations pledged his or their credit to raise funds to lend, interest free, to the Washington corporation to enable it to operate (R. 622; App. Br. 6-7).

The Seattle store was in process of being closed when the receiver was appointed (App. Br. 9, 33, 44, 45, 52, 55, 56, 60, 67) even though the \$500 a month lease had several years to run. The Los Angeles store also had been closed as a losing venture (R. 338) even though its lease had some time to run (R. 608-609). Furthermore, the liability for rent could be reduced by the amount received from the space from another, so that the liability might even have been nil or would be merely the difference between the rent reserved and the rental value. *Brown v. Hayes*, 92 Wash. 300, 159 Pac. 89. Theoretical profit possibilities claimed by the appellee in a compilation such as appellee's Appendix A (never offered or introduced below as an exhibit and therefore not the subject of cross-examination nor is its accuracy conceded) did not work out in practice (R. 611-12). The

government's witness Ester himself testified to the losses (Reply Br. 16-17). It is therefore untrue to say in effect that the elimination of the unprofitable Seattle location was impossible or that the government showed that the store would not be closed while the rental of \$500.00 per month continued to be payable (Br. 56).

Br. p. 40. Appellee's statement that "bankruptcy was certain" and that "the inevitable insolvency proceedings could not be had under state law because the commingling of assets and liabilities of the Washington and California corporations prevented any effective liquidation under state law" is not based on evidence that each appellant thought or knew this, but represents the opinion of the writer of appellee's brief as to the state of the law. However, under Washington law, a common law assignee for the benefit of creditors was possible. *United Cigar Stores Company of America v. Florence Shop*, 171 Wash. 267, 17 P.2d 871, or a receiver could have been appointed. *Warren v. Porter Const. Co., Inc.*, 29 Wn.2d 785, 189 P.2d 255; *Snyder v. Yakima Finance Corporation*, 174 Wash. 499, 25 P.2d 108. A common law assignee or receiver could each recover preferences. *Seattle Association of Credit Men v. Green*, 45 Wn. 2d 139, 273 P.2d 513; R.C.W. 23.48.030, *supra*.¹³ Just as creditors came up to Washington to enforce their rights

¹³ If commingling of assets and liabilities occurred, creditors could disregard corporate entities and prove their claims against the combined assets. See *Platt v. Bradner Co.*, 131 Wash. 573, 579; 230 Pac. 633. Furthermore, creditors could consent thereto just as they raised no objection to consolidating the bankruptcy proceedings of the Washington and California corporations. There was no evidence that either of the defendants were aware of any of the difficulties of the type described by appellee or that bankruptcy was required or that either appellant even considered the possibility of bankruptcy (App. Br. 51).

in bankruptcy proceedings, so they might have come up to Washington to enforce their rights in either common law assignment or receivership proceedings. Furthermore, operation by appellants under the supervision of creditors was also possible as was, indeed, offered by appellants (R. 539-541, 684; App. Br. 10).

The statement that beginning December, 1952, appellants wanted to rid themselves of the contracts and debts and start over with a new corporation is not supported by the record. The jury found the defendants innocent of the charges of conspiracy and fraudulent transfer with respect to the moneys repaid Max T. Edwards in December, 1952, and January, 1953. Gilbert Edwards was not a stockholder of the corporation and there is no evidence whatsoever of his participation in any such plan as that claimed (App. Br. 52-54).

Br. p. 41. The statement that the \$36,500 was "more than full repayment of money" that Max T. Edwards loaned to the corporation (appellee states approximately \$35,000 was owed) (Br. 40) is unsupported by the record and is not a correct statement of how the matter was considered at the time payment was made of the loan account. The advances summarized in Deft. Ex. A-4 (App. Br. 6-9) show a balance owing to Max T. Edwards as late as March 9, 1953. Possibly, appellee is thinking of the separate account of an unpaid stock subscription and Cadillac car in relation to the amounts lent (or paid as appellee contends) in February, 1953 (App. Br. 9). Max T. Edwards paid everything he owed the corporation, even on appellee's theory, by February, 1953 (R. 122).

Appellee's statement of the circumstances surrounding the removal of the furniture and cash register ignores evidence in the government's own case of the plan to close the Seattle store (see App. Br. 2-18, 51-57, 59-61).

The statement as to cancellation of 75% of indebtedness ignores pertinent evidence summarized (App. Br. 9-11) consistent with innocence.

Br. p. 42. The statement about holding another California creditor in line "so that it would not throw" the corporation "into some sort of insolvency proceedings" is unsupported by the record. Government witness, Burch, testified (R. 272): "I told them I thought I could hold Horn & Cox off until we came back for the next meeting." There was nothing said about insolvency proceedings or about bankruptcy proceedings. See also R. 267. Max Edwards' testimony that the Horn & Cox suit "was a bolt out of the blue" (App. Br. 11) was justified not only because he believed the claim was against the Washington corporation, not the California corporation (which he considered a separate entity) against which suit was brought (A-26), but because Mr. Burch of Hall & Co. told him he thought he could hold Horn & Cox off "until we came back for the next meeting." Appellee's statement of the circumstances out of which the bankruptcy arose should be read in light of the unchallenged statements (App. Br. 11, *et seq.*).

The statement that there were unexplained large losses in 1952 and that these resulted from shipments of electric razors to one of the Vancouver corporations is unsupported by the record. Appellee's witness, Ester,

the accountant, testified to losses. Instead of asking him to explain the losses, appellee attempted to have appellant, Gilbert Edwards, do so by answering questions on the witness stand on cross-examination, even though Gilbert Edwards pointed out that he was not an accountant (R. 749). Gilbert Edwards relied upon the accountant, Ester, and Ester was the one who could explain the figures which he compiled (R. 748). Furthermore, there is no evidence that the losses were due to shipments of electric razors to one of the Vancouver corporations. The reference to the removal of records concerning shipments to Vancouver ignores the facts summarized (App. Br. 47).

Br. p. 43. The statement that appellents falsely testified that the value of shavers sent to Canada was less than the value of cutlery shipped from Canada to Seattle is unsupported by the record (See App. Br. 8-9).

The statement as to date of incorporation of Shaver-aids, Inc., is wrong. That corporation was incorporated February 9, 1953, under circumstances reviewed (App. Br. 4-5).

The contention as to intention to take over profitable concessions confuses intention and purpose with unintended and unexpected sequence of events forced by the unexpected filing of the California suit (App. Br. 51-57, 11-13; Reply Br. 15). Repayment of debts and the closing of the Seattle store during the course of which the cash register was sold and conveyed by public conveyance to the buyer and adding machine delivered for use of another officer of the corporation, temporary machine being substituted pending completion of closing opera-

tions (confirmatory of closing), is entirely consistent with innocence (Reply Br. 20).

Br. p. 43. The statement “money for Shaver aids, Inc., came from the bank account of Edwards Shaver Departments, Inc.,” assumes erroneously that the \$2,000 paid to Gilbert Edwards (App. Br. 66) was charged as a miscellaneous expense (Reply Br. 2, *supra*). The record shows that while distributed to the miscellaneous account it had “not been charged to any specific account” (R. 147). The accountant, Ester, explained that he hadn’t gotten around to making the necessary postings (App. Br. 14).

The statement that “it was appellants’ intention to buy up assets of the bankrupt at distress sale” when the cash register was transferred, is unsupported by the record. There is no such evidence. The statement as to what Shaver aids, Inc., did, ignores the circumstances of its incorporation (App. Br. 4-5) and its utilization for reasons of economy in the purchase of receivership assets (R. 688; App. Br. 12).

Br. p. 44. The statement that some of the proceeds of the \$36,500 paid was still in Max Edwards’ possession after May 7, 1953, is utterly unsupported in the record (Reply Br. 7).

The statement that appellants have kept property of the bankrupt, including cash register, furniture, adding machine, is unsupported by the record and is a serious error. The cash register and furniture were paid for by Edwards, Ltd., for a total charge of \$251 (Ex. A-34, App. Br. 17). The statement as to trade names if intended to refer to Shaver aids or Cutlaire as private

brand names undoubtedly meant the names used by Shaver Raids, Inc., and Cutlaire, Inc., organized February 9, 1953 (App. Br. 5). If that is so, appellee possibly assumes, without evidence, that the names were copyrighted or registered in some fashion; or assumes without evidence that Shaver Raids, Inc., didn't have or acquire the right to the use of the name either after incorporation February 9, 1953, or as a result of the receivership sale (App. Br. 12, 68; R. 368, 553); or assumes some objection made and disregarded. Just what each appellant should have done to vest title to the unregistered trade name in the bankrupt on May 7, 1953, isn't clear. There is no claim that either appellant could have or refused on request to do so. On the contrary, cooperation was shown (App. Br. 12). As to records relating to concession possibilities appellee does not explain what is meant by the word "records." Possibly, appellee means correspondence such as that introduced in evidence below. There is no claim that such correspondence constituted contracts, or had any salable value or other value to creditors.

The statement that appellants falsely testified that the reason the cash register was shipped to Canada was that the store was being closed is unsupported by the record. Appellee cannot disregard the evidence of its own witness, Mr. Ester, who testified to the plan in 1952 to sell the Seattle store or to close it (R. 319). Since the effort to sell was fruitless (App. Br. 9) there was no alternative but to close it (as also testified to by appellants) (App. Br. 9, 33, 44, 45, 52, 55, 56, 60, 67).

In any case, the inferences claimed must show the

transfer of the cash register February 20, 1953, to be “in contemplation of a bankruptcy proceeding” and “with intent to violate the bankruptcy law.”

After reviewing appellee’s statement (Br. 38-45) it is to be noted appellee does not challenge appellants’ statement (App. Br. 51):

“There was no evidence of discussion, consideration or contemplation in fact of bankruptcy at the time of the transfer [Attorney Sharp testified that he wasn’t even consulted by either of the Edwards relative to bankruptcy prior to May 7, 1953.” (R. 668)].

At best, if there was contemplation of anything, it was a contemplation of a state of insolvency, or operation under supervision of creditors. This is not enough (App. Br. 53). In any case, we have here a transfer for value on February 20, 1953, consistent with innocence; not a transfer at a time when the thought of bankruptcy was the impelling cause thereof. There were no pending negotiations to prevent bankruptcy (*Cf. Conrad, Rubin & Lesser v. Pender*, 289 U.S. 472, 77 L.ed. 1327, 53 S.Ct. 703) and the transfer had been contemplated and was pursuant to a 1952 plan to close the unprofitable Seattle store (but continuing in business) (App. Br. 9, 33, 44, 45, 55, 56, 60, 67). There was nothing secret or concealed about the transfer. As pointed out in *Wolf v. U.S.* (4 Cir.) 238 Fed. 902, 905, in reversing a conviction of concealment against one of two brothers: “ * * * it is certainly a tax on credulity to suppose that he would openly engage in sending, by public conveyance, trunks of merchandise from that stock to his own store at Johnsons * * * the circumstances of which so much is

sought to be made is fully consistent with an honest purpose; it is absolutely inconsistent with criminal intent." This is especially true here in view of the evidence that the business was continuing with plans for expansion (App. Br. 4-5, A-25) and only seven days before, Max T. Edwards had lent \$1,000 to the company for its continued operation (2-13-53, R. 772, App. Br. 9).

Furthermore, appellee makes no claim that either defendant knew that in transferring the cash register for value back in February, 1953, under the circumstances shown, that they were violating any duty imposed by law of which they had any knowledge (App. Br. 55; Reply Br. 12).

Appellee's statement of what the jury could have found from circumstantial evidence not only relies upon conjecture, and inference contrary to evidence, but fails to point out evidence in the record which shows that the inferences claimed are not inconsistent with innocence, *Karn v. U.S.* (9 Cir.) 158 F.2d 568, 570. The court, in reversing the conviction below on account of insufficient evidence, stated:

"The prosecution relied entirely upon circumstantial evidence for a conviction. It is sufficient to say that under such circumstances the evidence must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. The evidence should be required to point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis but that of guilt. 23 C.J.S. Criminal Law, § 907, pp. 151, 152; *Paddock v. United States*, 9 Cir., 1935, 79 F.

2d 872, 876; *Ferris v. United States*, 9 Cir., 1930, 40 F.2d 837, 840.”

Appellee’s claim (App. Br. 57-58) that concealment need not continue throughout the course of bankruptcy proceedings, but may take place upon the occurrence of bankruptcy (Br. 57) without even permitting a reasonable time to comply with the law (App. Br. 50)¹⁴ is at least an open question in this circuit (*Rachmil v. United States* (9 Cir.) 43 F.2d 878, 880 (quoting with approval from *Gretsch v. United States* (3 Cir.) 231 Fed. 57, 62) “ ‘Unless concealment lasts, it ceases to be concealment’.” and appellee’s cases do not support it (Br. 57-58). However, appellants contend (App. Br. 50) that there never was concealment at any time, either before or after bankruptcy (See also App. Br. 46-50).

In the following concealment cases the government’s evidence of fraudulent concealment, while tending to prove guilt, was nevertheless held insufficient. *U.S. v. Thatcher* (3 Cir.) 131 F.2d 1002, reversing District Court (Unexplained missing merchandise within two and one-half months of bankruptcy); *Wolf v. U.S.* (4 Cir.) 238 Fed. 902, 905, reversing District Court (Defendant officer’s frequent visits to corporation’s store where he might have obtained knowledge of concealment); *Reimer-Gross Co. v. U.S.* (6 Cir.) 20 F.2d 36, reversing District Court (Evidence of shortage in year preceding bankruptcy); *U.S. v. Pokrass* (D.C. Pa.) 32 F.Supp. 283 (Wide discrepancy between cost of mer-

¹⁴The rule contended for by appellee doesn’t give a person even a reasonable time to comply. How and to whom is a person to deliver up or disclose property when all creditors with provable claims cannot be known until later (Reply Br. 5); when no trustee is known; when adjudication may not even take place after the filing of the petition?

chandise purchased by bankrupt and amount of money deposited in bank by bankrupt together with small amount of merchandise on hand), and *U.S. v. Lowenstein* (D.C. Pa.) 126 Fed. 884 (Improper payment of creditors by bankrupt after bankruptcy petition filed with money received from debtors).

Point III.

Appellants' contention that venue as to Max Edwards was not proved (App. Br. 57-58) is attempted to be "completely answered by Sections 2, 3237 and 3238 of Title 18 U.S.C.* * * " (Br. 60) (Reply Br. 5).

Appellee overlooks the fact that Max T. Edwards was and is a long-time resident of Vancouver, B.C. (App. Br. 2, R. 444-446). Appellee made no attempt to prove Max T. Edwards to be an American citizen, and does not challenge appellants' statement that he was a Canadian subject (App. Br. 2, 57, 58).

18 U.S.C. Sec. 3238 has no application to crimes committed by Canadian citizens in Canada (*U.S. v. Baker*, 136 F.Supp. 546). Sec. 3237 only applies to crimes committed in more than one district. British Columbia is not a district of the United States. Section 2 defines "principal" in terms of one who aids or procures the commission of a crime or causes it to be done. There is no evidence that Max T. Edwards procured Gilbert Edwards to commit the crime of concealment or fraudulent transfer. Furthermore, the act of aiding and abetting, if any there be, took place in British Columbia, not in the United States so as to give the District Court Jurisdiction (App. Br. 57, 58).

Specification of Error No. 4

Appellee's sole response to appellants' argument on this point (App. Br. 62; Br. 61) is that if evidence is sufficient as to Count XIX, affirmance is required as to the other counts regardless of how insufficient the evidence as to such other counts may be.

The rule that an appellate court need not notice errors in other counts if there is no error with respect to at least one count in the case of concurrent sentences, is not mandatory; it is merely discretionary.

What appellee is asking this court to do is to affirm a judgment of conviction on eight counts, not because of guilt on those counts, but because of claimed guilt on Count XIX. This is urging a conviction of separate crimes involving \$36,500 and an adding machine, because of claimed guilt of a different crime, namely, transfer of a \$126 cash register, with resulting respective prison sentences of three years and two years. Furthermore, appellee ignores the principle that a defendant unfairly convicted by evidence which was admitted as to insufficient counts dealing with fraudulent concealment (and much of which evidence would not be admissible are too remote as to Count XIX), requires that a new trial be granted (App. Br. 29-30, 62-65).

Here, the not guilty verdict on the conspiracy and fraudulent transfer counts, which charged that the conspiracy and transfers were made "in contemplation of a bankruptcy proceeding" and "with intent to defeat the bankruptcy law" makes all the less comprehensible the jury's contrary view on these points with respect to Count XIX. This fact points to the prejudicial effect

of immaterial and remote evidence which would have been inadmissible if Count XIX involving the claimed fraudulent transfer of the \$126 cash register on February 20, 1953, were alone presented to the jury under proper instructions.

**Specifications of Error Nos. 5, 6, 7 (Br. 61-64;
App. Br. 65-69)**

Appellee claims that the request by Max T. Edwards (acting under his attorneys' advice) addressed to the Washington Court Receiver to return the records of the California corporation, for whom he was not receiver, to Mr. Edwards' attorneys (Spec. Err. No. 5); the payment of \$2,000 to Gilbert Edwards (Spec. Err. No. 6); and evidence of the sale by the Receiver of certain receivership assets to Shaveroids, Inc. (Spec. Err. No. 7) were "proof of appellants' intent," *i.e.*, that they evidenced a plan to take over the profitable part of the shaver concession business free of the old contracts and burdens of Edwards Shaver Departments, Inc. Appellee's conjectures and suspicion on this point were apparently rejected by the jury in the fraudulent conspiracy and transfer counts (Reply Br. 21). The evidence admitted did not show that either defendant had knowledge of any duty imposed by the Bankruptcy Law, which prohibited the request for California records; or the payment of the sum of \$2,000 to Gilbert Edwards, \$1,800 being a repayment of a noninterest bearing loan, and \$200 being an advance ultimately released (Ex. A-29) Reply Br. 18, *supra*); or which prohibited Shaveroids, Inc. from making a purchase at a receivership sale made at the request of the Bon Marche (R. 372) and no impropriety being shown or claimed

on or in connection with the sale (R. 365). The foregoing evidence was not only not admissible with respect to Count XIX; it was inadmissible with respect to the remaining counts of the Indictment.

Specification of Error No. 8 (Br. 63-64; App. Br. 69)

Appellee contends that evidence of amount paid to creditors in the receivership and bankruptcy proceedings showed what would be realized on forced sale to creditors. Appellee made no attempt to show what the receivership or trustee expenses were or what they should be. Furthermore, evidence as to what was realized at some unproved date subsequent to February, 1953, could hardly be related back to concealments so-called of the payments made in December and January preceding and of the transfer of the cash register and the delivery of the portable adding machine in February, 1953. The evidence claimed was not only highly remote, but prejudicial.

Specification of Error No. 9 (Br. 64; App. Br. 70)

Appellee claims that the court rejected Ex. A-22 in the exercise of discretion which appellee now admits the court had (Br. 64). No such admission was made to the District Court. We submit that a fair reading of the record shows that the court never exercised his discretion because he never recognized that he had such discretion. The error and prejudice resulting from the refusal to admit the exhibit, enhanced by appellee's claims on the matter of accounting for the expenditure of the \$36,500, was not saved by appellee's willingness to consent to the introduction of the exhibit by imposing unacceptable conditions. The District Court didn't

exercise the discretion he should have exercised. (See analogy, *Kirk v. United States* (9 Cir.) 185 F.2d 185, p. 189).

Specification of Error No. 10 (Br. 65; App. Br. 72)

Appellee's argument that Motion for New Trial is reviewable for abuse of discretion is not answered. If this court determines that instead of itself granting a new trial on this point the case should be remanded to enable the District Court to consider the motion anew in light of this court's opinion (analogy, *Heald v. United States* (10 Cir.) 175 F.2d 878, p. 883, affd. 338 U.S. 859, 70 S.Ct. 101), attention could also be called to the following (App. Br. 74).

The court below twice erroneously instructed the jury that the Trustee was appointed May 7, 1953 (R. 806, 807) (Reply Br. 5). At the same time he instructed the jury (R. 807) :

"Property cannot be concealed from a bankruptcy trustee until he is appointed to that position after the commencement of bankruptcy proceedings."

The jury might have found the defendants guilty of concealment from the Trustee on May 7, 1953, when, in fact, not only is that date wrong, but there is no evidence as to when the Trustee was appointed and there is no evidence as to when appellants first acquired knowledge of such appointment. This prejudice remains even though the Indictment also charged concealment from creditors, since there is no way of knowing the basis for the jury's verdict. The fact that no exceptions were taken does not, in view of Rule 52b, prevent this court from noticing this error in arriving at a determination

as to whether a fair trial was had (See *Herzog v. United States* (9 Cir.) 235 F.2d 664; App. Br. 72-76).

CONCLUSION

Appellee's attempt here is to obtain affirmance of convictions as to eight counts and, if possible, without examination and review of those counts notwithstanding the serious claim of appellants that evidence as to these counts was insufficient (Reply Br. 5) and prejudicial as to other counts (Reply Br. 24). This attempt is predicated on circumstantial evidence with respect to Count XIX insufficient and wholly consistent with innocence (Reply Br. 12). On top of this, errors in admissions or rejection of evidence prejudiced appellants even more (Reply Br. 25-7). The failure of the District Court to instruct the jury on material legal points and the erroneous instructions on the matter of the Trustee's appointment, even though unexcepted to, is in light of all the facts, the kind of error or defect preventing a fair trial that Rule 52b was intended to protect against (Reply Br. 27). Under these circumstances, the three-year and two-year prison sentences (whose severity is not challenged by appellee) invite review of the matters complained of.

The judgment should be reversed with directions to enter judgment of acquittal, or, alternatively, to order a new trial. This should be done as to each appellant.

Respectfully submitted,

PRESTON. THORGRIMSON & HOROWITZ
CHARLES HOROWITZ

Attorneys for Appellants.

1900 Northern Life Tower,
Seattle 1, Washington.

No. 16,059

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LEE TIN MEW,

Appellant,

VS.

WILLIAM S. JONES, United States Im-
migration and Naturalization Service,
Appellee.

**On Appeal from the United States District Court
for the District of Hawaii in Misc. No. 737.**

BRIEF FOR APPELLEE.

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,

By CHARLES B. DWIGHT III,
Assistant United States Attorney,
District of Hawaii,
Federal Building, Honolulu, Hawaii,
Attorneys for Appellee.

FILE

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PAUL P. O'BRIEN, C

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No. 16,059

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LEE TIN MEW,

Appellant,

vs.

WILLIAM S. JONES, United States Im-
migration and Naturalization Service,

Appellee.

**On Appeal from the United States District Court
for the District of Hawaii in Misc. No. 737.**

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

On May 7, 1958 Appellee filed a verified petition for an order to compel the Appellant to appear and testify (R. 1-2). On May 8, 1958, the District Court ordered Appellant to appear and testify on May 15, 1958 (R. 3). On May 12, 1958, Appellant filed a motion to quash (R. 4), which was denied on May 14, 1958 (R. 21). Notice of appeal was filed by Appellant on May 14, 1958 appealing from the order of May 8, 1958. The order was a final appealable order. *U. S. v.*

Vivian (7 Cir. 1955), 217 F. (2d) 882, 883. Jurisdiction of this Court is predicated upon 28 U.S.C. 1291 and 1294.

STATEMENT OF THE CASE.

On May 7, 1958 Appellee attempted to serve a subpoena on Appellant at his home (R. 32). However he was not there and later that day Appellant through his attorney, W. Y. Char, called and asked why the Appellee wished to see Appellant (R. 32). At the request of Appellant and his attorney, who presented himself voluntarily at Appellee's office, a subpoena was served and testimony was taken on May 7, 1958 (R. 32). The Appellant was sworn and answered only a few questions concerning his name and thereafter refused to answer any and all questions asked him by Appellee (R. 23-28) (Pltf's Exhibit I). The Appellant refused to answer the questions on the grounds of *Minker v. U. S.*, 350 U.S. 179 (R. 25). As a result of this refusal Appellee applied for (R. 1-2) and obtained an order from the United States District Court ordering Appellant to appear and testify before Appellee (R. 3). Thereafter Appellant filed a motion to quash the order, together with an attached affidavit (R. 4-5). The motion to quash was denied (R. 21).

QUESTION PRESENTED.

May Appellant, a person an Immigration officer suspects of being an alien, refuse to answer questions

concerning his status and the status of some of his alleged relatives on the grounds of *Minker v. U.S.*, 350 U.S. 179?

SUMMARY OF ARGUMENT.

Section 235(a), (8 U.S.C. § 1225(a)), clearly gives Immigration officers the power to question under oath any person concerning the privilege of any alien or person the Immigration officer believes or suspects to be an alien concerning his privilege to reside in the United States. In view of this clear power set forth in § 235(a), it is also clear that § 235(a) provides the means of requiring testimony from these persons by administrative subpoena and/or Court order, if necessary.

ARGUMENT.

Appellant contends that *Minker v. U. S.*, 350 U.S. 179, governs the factual situation herein and consequently the Appellant may not be forced to give testimony where he may be the subject of an investigation. The *Minker* case, *supra*, dealt exclusively with the power of Immigration officers to subpoena naturalized citizens and to force them to give evidence which could be used for possible denaturalization proceedings. The Supreme Court held that § 235(a) was not definite enough in view of the possible consequences of this type of coerced testimony to allow the use of the administrative subpoena power to elicit evidence from a naturalized citizen concerning his own de-

naturalization. The facts of this case are entirely dissimilar. As is usual, there is a conflict of testimony or evidence in this case as to the Appellant's status. The Appellee testified that he suspected the Appellant to be an alien (R. 31), and although the Appellant refused to answer questions put to him by the Appellee on May 7, 1958 concerning his place of birth, and date of birth, and nationality (R. 25), and how he first came to the United States (R. 25), and whether he was born in Sin Chin Village in China (R. 26), he has now filed with the Court attached in an affidavit form to his motion to quash the following facts: that he was born in Honolulu on April 4, 1894; that he returned to China when he was five years old; that on December 10, 1922 he returned to Hawaii and was admitted as a native born citizen (R. 5). From these facts, he claims that he is a naturalized American citizen by collective naturalization (R. 5). It may easily be seen from perusal of the questions set forth in Plaintiff's Exhibit I (R. 23-28) that the issue involved is one of identity. For example, is the Appellant the same person who left Hawaii when he was five years old? This question since there is no record of birth can only be resolved by a full and free disclosure by the Appellant of the answers to the questions put to him by the Appellee. In this regard, as the questions are reasonable and reasonably aimed at eliciting the information desired, the Courts will not interfere with the method of questioning used by the Immigration officer. *Kaneda v. U. S.*, 9 Cir. 1922, 278 F. 694, cert. den. 259 U.S. 583, 42 S.Ct. 586.

Section 235(a), Immigration and Nationality Act, provides in part as follows: “. . . any Immigration officer . . . shall have power to administer oaths and to take and consider evidence *of or from* any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States . . . any Immigration officer . . . shall have power to require by subpoena the attendance and testimony of witnesses before Immigration officers . . . and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States . . . and to that end may invoke the aid of any Court of the United States. . . .” (Emphasis supplied.)

It is drawn to the attention of the Court that here the Appellee was attempting to take and consider evidence of and from a person touching on the privilege of a person suspected to be an alien to reside in the United States. It would seem as differentiated from the *Minker* case, *supra*, that here the Immigration officer’s authority is clearly spelled out in the section itself, and to say under the facts herein presented that the Appellant would not be considered a witness, strains the plain meaning of the statute and obvious intent of Congress.

Section 235(a) is a reenactment of Section 16, Immigration Act of 1917 (39 Stat. 885, 8 U.S.C. 1946 Ed. 152). There are certain changes which are not pertinent here and unless something clearly to the contrary

appears the former interpretation of the statute should apply.

In connection with the construction of § 235(a), it is to be noted that the predecessor section, § 16, Immigration Act of 1917 (39 Stat. 885, 8 U.S.C. 1946 Ed. 152), was held to allow the subpoena power to be used against aliens in either deportation or exclusion proceedings, i.e., the alien himself was subpoenaed and was compelled to testify. *Graham v. U. S.*, 9 Cir. 1938, 99 F. (2d) 746; *Loufakis v. U. S.*, 3 Cir. 1936, 81 F. (2d) 966.

It is contended that the comparisons made in *Minker v. U. S.*, *supra*, at page 189, footnotes 9, 10, and 11, are inapposite herein in view of the fact that there can be no differentiation made between the person questioned and "the alien" until after the questions are asked since no formal administrative proceeding would have been instituted prior to the questioning under § 235(a).

As regards Appellant's belated statement in affidavit form concerning a few of the facts with reference to his birth, it is suggested to this Court that the issue involved in this investigation is one of identity and that administrative decisions are not *res judicata* of citizenship. *Wong Chow Gin v. Cahill*, 79 F. (2d) 854; *Lum Mon Sing v. U. S.*, 9 Cir., 124 F. (2d) 21; *Flynn v. Ward*, 1 Cir. 1938, 95 F. (2d) 742; *Mock Kee Song v. Cahill*, 9 Cir. 1938, 94 F. (2d) 975; *Mah Toi v. Brownell*, 9 Cir. 1955, 219 F. (2d) 642, cert. den. 350 U.S. 823, 76 S.Ct. 49.

CONCLUSION.

It is submitted that the Appellee had clear statutory authority to do what he did. The order appealed from should be affirmed.

Dated, Honolulu, T. H.,
August 25, 1958.

Respectfully submitted,

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,

By CHARLES B. DWIGHT III,
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District of Hawaii,

Attorneys for Appellee.

No. 16060 ✓

United States
Court of Appeals
for the Ninth Circuit

FRED JAY RUDMANN, doing business as Constructors of Hawaii, bankrupt, Appellant,

VS.

ALFRED E. LINCZER, Trustee in Bankruptcy of the Estate of Fred Jay Rudmann, doing business as Constructors of Hawaii, Bankrupt, Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Hawaii

FILED

SEP 3 - 1958

PAUL P. O'BRIEN, CLERK

No. 16060

United States
Court of Appeals
for the Ninth Circuit

FRED JAY RUDMANN, doing business as Constructors of Hawaii, bankrupt, Appellant,

vs.

ALFRED E. LINCZER, Trustee in Bankruptcy of the Estate of Fred Jay Rudmann, doing business as Constructors of Hawaii, Bankrupt, Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Hawaii

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Linczer.

FRANCIS I. TSUZUKI,
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205 Merchant St.,
Honolulu, T. H.

For the Creditor, Standard Plumbing Co.,
Ltd.

In the United States District Court, in and for
The Territory of Hawaii

Bankruptcy No. 3665

In the Matter of

FRED J. RUDMANN, dba CONSTRUCTORS
OF HAWAII, Bankrupt.

TRUSTEE'S REPORT ON EXEMPT
PROPERTY

Comes now Alfred E. Linczer, duly appointed and qualified trustee of the above entitled bankrupt estate and herewith submits his report on the property claimed as exempt by the bankrupt in the schedules annexed to his petition.

1) The trustee requested his attorney Howard K. Hoddick to examine into the subject of whether the property claimed as exempt by the bankrupt is in fact exempt and his attorney has advised him as follows:

a) That the real property is not "exempt" in that it does not come within any Territorial or Federal law defining it as exempt property but that said property does not constitute an asset of the bankrupt estate;

b) That the automobile is not exempt property and that the trustee as such has a one-half interest in the said automobile.

Attached to this report is a letter received by the

trustee from his attorney setting forth the reasons for his conclusions.

Dated at Honolulu, T. H. this 15th day of September, 1956.

/s/ ALFRED E. LINCZER.

[Letterhead of Howard K. Hoddick.]

September 12, 1956

Mr. Alfred E. Linczer, Trustee in Bankruptcy
of the Estate of Fred J. Rudmann, dba
Constructors of Hawaii
Honolulu, T. H.

Dear Mr. Linczer:

You have asked me to examine into the question of whether the properties claimed as exempt by the above named bankrupt are in fact exempt.

With reference to the real property, this was conveyed to the bankrupt and his wife "as joint tenants with full rights of survivorship and not as tenants in common, their assigns and the heirs and assigns of the survivor of them" in 1945. The original deed is recorded in Liber 1875 at Page 113 and is in the possession of the Bank of Hawaii, Main Branch.

At the first meeting of creditors the Court directed the attention of the undersigned to the case of Mangus v. Miller, 317 U. S. 178 (1942). In that case, the property had been conveyed to the bankrupt and to another as joint tenants. The Court found that under the Utah law, the interest of one

of the joint tenants was subject to execution and separate sale and could be alienated. This being the law in Utah, the Court ruled as follows:

“When so locally recognized, the interest of a joint tenant is a property interest subject to the jurisdiction of the bankruptcy court under §70 of the general Bankruptcy Act, 11 USC §110”.

The Court further stated:

“It is enough that one joint tenant is authorized to file his petition under §75 and subject his interest to the jurisdiction of the Bankruptcy Court just as he may under §70 of the Bankruptcy Act.” (Emphasis supplied).

A discussion of what interest, if any, the trustee has in property held by the bankrupt with another as tenants by the entirety is contained in *Colliers* Vol. 4, Paragraph 70.17, Pages 1034-1041. In brief it is the position of the editor that if the interest of the bankrupt in the property held either as a tenant by the entirety or as a joint tenant with full right of survivorship may not be encumbered or otherwise alienated without the consensus of the other tenant or tenants that then the bankrupt does not have an interest which the trustee can reach and apply. A good discussion of the reason for this rule is set forth in *McMullen v. Zabowski et ux*, 49 ABR 357. This case involves a petition of the trustee to set aside a “fraudulent” conveyance to a bankrupt husband and his wife as tenants by the entirety. The Court had this to say on the general proposition:

“Defendants invoke the familiar rule that

neither of the owner of property held by them as tenants by the entirety has a separate interest therein, which can be disposed of by either one of such tenants or seized by his creditors or pass to his trustee in bankruptcy. (Citations omitted). This result does not, as defendants appear to suppose, arise from any theory or rule of exemption, as property held by the entireties is often, as here, not 'exempt' in any true legal sense of, as is, for example, a homestead; but the title itself to the property held by such an estate is not capable of division into separate interests, undivided or otherwise, but in one 'entirety', entirely owned by each tenant. There is, therefore, in such a tenancy, no title owned by one of such tenants, and no 'property which prior to the filing of the petition he could by any means have transferred, or which might have been levied and sold under judicial process against him,' and consequently no interest therein which is vested 'by operation of law,' in the trustee under §70(a)(5) of the Bankruptcy Act."

It appears to be well established law in Hawaii that property granted to a husband and wife as joint tenants with full rights of survivorship vest in them an estate by the entirety. *Paahana v. Bila*, 3 Haw. 725 (1876); *Kenway v. Notely*, 5 Haw. 123; *Wailehua v. Lio*, 5 Haw. 519 (1886); *Kuanalewa v. Kipi*, 7 Haw. 575 (1889); *Robinson v. Aheong*, 13 Haw. 196 (1900).

In the Paahana case which involved a grant to a husband and to his wife, the Court said:

“They are not properly joint tenants of such lands, since, though there is a right of survivorship neither can convey so as to defeat this right in the other. Each takes an entirety of the estate.”

In the Robinson case, there was a devise by will to Kaahinu and to two grandchildren, the two grandchildren happening to be husband and wife. As to the interest of the two grandchildren, Kaahinu having predeceased the testator, the Court stated:

“It is agreed that these (the two grandchildren) being husband and wife, took neither as tenants in common, nor as joint tenants, but by the entirety.”

Accordingly, it is my conclusion that under Hawaiian law, the bankrupt had no interest in the real property which he could encumber or alienate and that, therefore, both he and his wife hold an entirety of the estate and that the property is not subject to the jurisdiction of the bankruptcy court.

With reference to the automobile, the rule as to the holding of property as tenants by the entirety appears to be limited to real property or interest therein. The L. O. C. on file with the City and County Treasurer's Office reflects the following: “Registered Owner: Fred J. Rudmann and Mae Rudmann”. Under these circumstances, I believe

that the trustee is entitled to one-half of its value, whatever that may be.

Very truly yours,

/s/ HOWARD K. HODDICK,

Howard K. Hoddick.

HKH:hm

Received 9/15/56. Referee in Bankruptcy.

[Title of District Court and Cause.]

OBJECTION BY CREDITOR TO TRUSTEE'S
DETERMINATION OF STATUS OF REAL
PROPERTY

To The Honorable Ronald B. Jamieson, Referee
In Bankruptcy:

Standard Plumbing Company, Ltd., a Hawaiian corporation, of Honolulu, City and County of Honolulu, a creditor of the estate of the above named bankrupt, by its attorneys Ralph S. Inouye and Francis I. Tsuzuki, objects to the determination by the trustee that the real property described in Schedule B-1 and B-5 of the above named bankrupt's petition is not includible in the estate or assets of said bankrupt, and specifies the following ground of objection:

Said real property held in joint tenancy by bankrupt and his wife is subject to the jurisdiction of the Bankruptcy Court, and the non-exempt portion of the interest passes to the trustee, and be-

comes part of the assets available to the claims of the creditors.

Wherefore, your objector prays that this Court determine that said bankrupt is not entitled to exclude from his assets the said real property interest, and that the trustee be required to designate the same and set aside for the benefit of creditors the non-exempt portion of said interest; and that your objector have such other and further relief as is just.

RALPH S. INOUE and

FRANCIS I. TSUZUKI,

/s/ By FRANCIS I. TSUZUKI,

Attorneys for Standard Plumbing Company, Ltd.

[Endorsed]: Filed October 10, 1956.

[Title of District Court and Cause.]

ORDER SUSTAINING OBJECTION OF CREDITOR

Pursuant to the Decision filed herein on April 9, 1957, it is hereby Ordered that the Objection by Creditor to Trustee's Determination of Status of Real Property filed herein on October 10, 1956, is hereby sustained; that said Bankrupt is not entitled to exclude from his assets his interest as a joint tenant with his wife in the real property described in Schedule B-1 and B-5; that the Trustee herein shall designate and set aside said real

property interest for the benefit of creditors herein; that said interest in real property is now held by said Trustee as tenant in common with the said Bankrupt's wife; that the Trustee shall have said real property appraised and shall take other appropriate steps to realize proceeds by sale, partition or otherwise of the said real property interest for the benefit of the creditors herein, subject to the approval of the Court.

Dated: Honolulu, Hawaii, this 31st day of May, 1957.

/s/ RONALD B. JAMIESON,
Referee in Bankruptcy.

[Endorsed]: Filed May 31, 1957.

[Title of District Court and Cause.]

PETITION FOR REVIEW AND STAY PENDING REVIEW

That Fred Jay Rudmann, the Bankrupt in the above entitled matter, being aggrieved by the Order of the Referee sustaining the objections to the Trustees' determination of status of Real Property filed by the Standard Plumbing Company, Limited, entered and filed herein on the 31st day of May, 1957, pursuant to the decision of the Referee filed on April 9, 1957, herewith respectfully petitions for review of such order by a District Judge as provided for in Section 39 (c) of the Bankruptcy Act.

The Referee erred in entering and filing said Order sustaining the objection filed herein by the Standard Plumbing Company, Limited, for the following reasons:

(1) In finding, ruling and ordering that as a matter of law the deed to the Bankrupt and his wife made the Bankrupt and his wife joint tenants and not tenants by the entirety of the real property described in the deed, and that the Bankrupt is not entitled to exclude from his assets his interest as a joint tenant with his wife in the real property described in Schedule B-1 and B-5.

(2) In finding, ruling and ordering that the Bankrupt's estate and the Bankrupt's wife hold said real property as tenants in common and that the interest held by the Trustee is subject to the claims of the creditors of the Bankrupt, and that the Trustee set aside said real property interest of the Bankrupt for the benefit of creditors.

(3) In finding, ruling and ordering that the real property described in the deed to the Bankrupt and his wife is an asset of the Bankrupt's estate and thus subject to the claims of the Bankrupt's creditors.

That petitioner believes said order is erroneous for the reasons above and he has not filed this petition for the purpose of delay.

Wherefore, Petitioner prays: (1) that your Honor certify to the Judge of this Court and transmit to the Clerk the record in said proceedings having to do with or in any manner bearing upon

the Order aforesaid, as provided in Section 39 (c) of the Bankruptcy Act; (2) that your Honor enter an order staying the execution and enforcement of the Order to be reviewed upon such terms as will protect the rights of all parties.

Dated: Honolulu, Hawaii, this 7th day of June, 1957.

FRED JAY RUDMANN,
Bankrupt.

/s/ By KENNETH E. YOUNG,
His Attorney.

Territory of Hawaii,
City and County of Honolulu—ss.

I, Fred Jay Rudmann, named in the foregoing Petition for Review, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

Dated: Honolulu, Hawaii, this 7th day of June, 1957.

/s/ FRED JAY RUDMANN.

Subscribed and sworn to before me this 7th day of June, 1957.

[Seal] /s/ CAROL F. YOUNG,
Notary Public, First Judicial Circuit, Territory
of Hawaii. My Commission expires: 3/18/61.

Certificate of Service Attached.

[Endorsed]: Filed June 6, 1957.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW OF ORDER MADE BY
REFEREE

The above-named Bankrupt having filed his Petition for Review by a Judge of the Order Sustaining Objection of Creditor made and filed herein by the undersigned Referee on May 31, 1957, the undersigned Referee hereby certifies the attached record of (1) a statement of the questions presented, (2) the findings and orders thereon, (3) the petition for review, (4) a summary of the evidence, and (5) all exhibits as follows:

Statement of the Questions Presented

The questions presented for review are whether the real property referred to in Schedule B-1 of the Bankrupt's Petition filed herein on August 6, 1956, is, to any extent a part of the estate of said Bankrupt.

Findings and Orders Thereon

The Referee made the following findings of fact in his Decision filed herein on April 9, 1957:

"There is no question as to facts in this matter. The only question is the legal effect of the deed dated March 1, 1945, recorded in Book 1875, page 113, in the Bureau of Conveyances of the Territory of Hawaii.

"The real property which is the subject of said Objection was in March, 1945, conveyed by that deed to the Bankrupt and his wife 'as Joint Ten-

ants with full right of survivorship, and not as tenants in common, their assigns, and the heirs and assigns of the survivor of them.' At the time of the conveyance and ever since that time the Bankrupt and his said wife have been married to each other. The deed names the Bankrupt and his wife and describes them as husband and wife."

In reference to the above-mentioned findings of fact, the Referee made in his said Decision the following conclusion of law:

"As a matter of law, the above-mentioned deed to the Bankrupt and his wife made them joint tenants and not tenants by the entirety of the real property described in the deed, with the result that the Trustee of the Bankrupt's estate and the Bankrupt's wife hold said real property as tenants in common and that the interest held by the Trustee is subject to the claims of the creditors of the Bankrupt."

Pursuant to his Decision stating: "An appropriate order will be signed upon presentation sustaining the Objection filed herein by Standard Plumbing Company, Limited, and making available for the claims of the creditors of the Bankrupt the interest in said real property now held by the Trustee," the Referee on May 31, 1957, made and entered the following Order Sustaining Objection of Creditor:

"Pursuant to the Decision filed herein on April 9, 1957, it is hereby Ordered that the Objection by Creditor to Trustee's Determination of Status of Real Property filed herein on October 10, 1956, is

hereby sustained; that said Bankrupt is not entitled to exclude from his assets his interest as a joint tenant with his wife in the real property described in Schedule B-1 and B-5; that the Trustee herein shall designate and set aside said real property interest for the benefit of creditors herein; that said interest in real property is now held by said Trustee as tenant in common with the said Bankrupt's wife; that the Trustee shall have said real property appraised and shall take other appropriate steps to realize proceeds by sale, partition or otherwise of the said real property interest for the benefit of the creditors herein, subject to the approval of the Court."

The above-mentioned Decision and Order are on file in the above-entitled Court and cause in the office of the Clerk of said Court, having been filed therein on respectively April 9, 1957, and May 31, 1957, and are hereby incorporated herein by this reference.

The Petition for Review

The Petition for Review was filed in the above-entitled Court and cause in the office of the Clerk of said Court on June 6, 1957.

Summary of the Evidence

Because of lack of a Court Reporter no transcription was made of any part of the hearing on November 23, 1956, of the Objection by Creditors to Trustee's Determination of Status of Real Property filed herein on October 6, 1956, by Standard

Plumbing Company, Limited, a creditor of the Bankrupt. The Objection stated as follows:

“Standard Plumbing Company, Ltd., a Hawaiian corporation, of Honolulu, City and County of Honolulu, a creditor of the estate of the above named bankrupt, by its attorneys Ralph S. Inouye and Francis I. Tsuzuki, objects to the determination by the trustee that the real property described in Schedule B-1 and B-5 of the above named bankrupt’s petition is not includible in the estate or assets of said bankrupt, and specifies the following ground of objection:

“Said real property held in joint tenancy by bankrupt and his wife is subject to the jurisdiction of the Bankruptcy Court, and the non-exempt portion of the interest passes to the trustee, and becomes part of the assets available to the claims of the creditors.

“Wherefore, your objector prays that this Court determine that said bankrupt is not entitled to exclude from his assets the said real property interest, and that the trustee be required to designate the same and set aside for the benefit of creditors the non-exempt portion of said interest; and that your objector have such other and further relief as is just.”

Said Objection by Creditor to Trustee’s Determination of Status of Real Property is on file in the above-entitled Court and cause in the office of the Clerk of said Court, having been filed therein

on October 10, 1956, and is hereby incorporated herein by this reference.

At the hearing no evidence was introduced; but Ralph S. Inouye and Francis I. Tsuzuki, attorneys for Standard Plumbing Company, Limited, the objecting creditor, and Kenneth E. Young, attorney for the Bankrupt, were present and agreed to the relevant facts and stated them to be as found by the Referee in his Decision (see the Referee's findings of fact as above quoted in this Certificate). The Trustee and his attorney had notice of the hearing but did not appear at the hearing. The attorneys for the objecting creditor and the Bankrupt were in agreement that the Trustee had determined that he did not have title or right to the said real property or any part of it, on the theory that said real property was held by the Bankrupt and the Bankrupt's wife as tenants by the entirety.

The Exhibits

There being no evidence submitted at the hearing, there were no exhibits at the hearing filed or received in evidence at the hearing.

Dated: Honolulu, Hawaii, June 19, 1957.

/s/ RONALD B. JAMIESON,
Referee in Bankruptcy.

[Endorsed]: Filed June 25, 1957.

In The United States District Court
For The District of Hawaii

Bankruptcy No. 3665

In the Matter of

FRED J. RUDMANN, dba CONSTRUCTORS
OF HAWAII, Bankrupt.

ORDER

The Petition of the bankrupt for review filed herein on June 6, 1957, of an order entered by the referee in bankruptcy on May 31, 1957, that the bankrupt is not entitled to exclude from his assets his interest as a joint tenant with his wife in the real property described in Schedules B-1 and B-5 attached to his voluntary petition in bankruptcy, having come on for hearing before this Court on February 5, 1958, and there being present: the bankrupt, together with his counsel, Kenneth E. Young, Howard K. Hoddick, the attorney for the trustee, and Francis I. Tsuzuki, attorney for Standard Plumbing Company, Ltd., a Hawaiian corporation, and a creditor of the bankrupt estate, and the trustee through his counsel, having urged that the referee's order be confirmed and arguments having been presented, and this Court being fully advised in the premises,

It Is Hereby Ordered, Adjudged, and Decreed that the said Order of the Referee be and is confirmed and the Petition of the bankrupt for review of said order be and is dismissed.

Dated at Honolulu, T. H., this 10th day of February, 1958.

/s/ BEN HARRISON,
Judge, U. S. District Court.

Approved as to form:

/s/ KENNETH E. YOUNG,
Attorney for Bankrupt.

/s/ FRANCIS I. TSUZUKI,
Attorney for Standard Plumbing Co.

[Endorsed]: Filed February 10, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Fred Jay Rudmann, dba Constructors of Hawaii, the above named bankrupt, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final order entered herein on the 10th day of February, 1958 confirming the Order of the Referee entered herein on May 31, 1957.

Dated: Honolulu, Hawaii, this 21st day of March, 1958.

/s/ KENNETH E. YOUNG,
Attorney for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 21, 1958.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Whereas, a final order was entered in the above entitled action on the 10th day of February, 1958, in the United States District Court for the District of Hawaii, against the Appellant, Fred Jay Rudmann, dba Constructors of Hawaii, bankrupt; and

Whereas, the Appellant, Fred Jay Rudmann, dba Constructors of Hawaii, bankrupt, feeling aggrieved thereby has prosecuted his appeal to the United States Court of Appeals for the Ninth Circuit.

Now, Therefore, the Pacific Insurance Company, Limited, having an office and usual place of business at 198 South King Street, City and County of Honolulu, Territory of Hawaii, hereby undertakes in the sum of Two Hundred Fifty (\$250.00) Dollars, that if the final order dated February 10, 1958 so appealed from is affirmed or the appeal is dismissed, the Appellant, Fred Jay Rudmann, dba Constructors of Hawaii, bankrupt, shall pay to the Trustee in bankruptcy of the bankrupt estate of Fred Jay Rudmann, dba Constructors of Hawaii, bankrupt, all costs awarded against him on said appeal, or such costs as the Appellate Court may award if the final order is modified.

Dated: Honolulu, Hawaii, this 21st day of March, 1958.

[Seal] PACIFIC INSURANCE
 COMPANY, LIMITED,
/s/ By JOHN F. HRON,
 Attorney-in-Fact.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 21st day of March, A.D., 1958, before me appeared John F. Hron, to me personally known, who being by me duly sworn, did say that he is the Attorney in Fact of the Pacific Insurance Company, Limited, duly appointed under Power of Attorney dated the 24th day of May, 1957, which Power of Attorney is now in full force and effect, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said John F. Hron acknowledged said instrument to be the free act and deed of said corporation.

[Seal]. /s/ BETTY H. HASHIMOTO,
Notary Public, First Judicial Circuit, Territory
of Hawaii. My Commission Expires January
21, 1962.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 21, 1958.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL AND STATEMENT OF POINTS

Pursuant to Rule 75(a) of the Rules of Civil Procedure, Fred Jay Rudmann, dba Constructors of Hawaii, Appellant, hereby designates the following portions of the record, proceedings and evidence to be contained in the record on his appeal from the final Order and Judgment entered herein on February 10, 1958:

1. Trustee's Report on Exempt Property.
2. Objection by Creditor to Trustee's Determination of Status of Real Property.
3. Order of the Referee in Bankruptcy dated May 31, 1957.
4. Petition for Review and Stay Pending Review.
5. Referee's Certificate on Petition for Review of Order made by Referee.
6. Order of Judge Ben Harrison, United States District Court, dated February 10, 1958.
7. Notice of Appeal.
8. Bond for Costs on Appeal.
9. Statement of Points on which Appellant intends to rely, served herewith.
10. This designation.

Statement of Points

Pursuant to Rule 75(d) of the Rules of Civil Procedure, Fred Jay Rudmann, dba Constructors

of Hawaii, Appellant, hereby states the points on which he intends to rely on his appeal from the final Order and Judgment entered herein as follows:

1. That the Judge of the District Court erred in confirming the Order of the Referee dated May 31, 1957.

2. That the Judge of the District Court and the Referee in Bankruptcy erred:

(a) In finding, ruling and ordering that as a matter of law the deed to the Bankrupt (Appellant) and his wife made the Bankrupt (Appellant) and his wife joint tenants and not tenants by the entirety of the real property described in the deed, and that the Bankrupt (Appellant) is not entitled to exclude from his assets his interest as a joint tenant with his wife in the real property described in Schedule B-1 and B-5.

(b) In finding, ruling and ordering that the Bankrupt's (Appellant) estate and the Bankrupt's (Appellant) wife hold said real property as tenants in common and that the interest held by the Trustee is subject to the claims of the creditors of the Bankrupt (Appellant), and that the Trustee set aside said real property interest of the Bankrupt (Appellant) for the benefit of creditors.

(c) In finding, ruling and ordering that the real property described in the deed to the Bankrupt (Appellant) and his wife is an asset of the Bankrupt's estate and thus subject to the claims of the Bankrupt's (Appellant) creditors.

Dated: Honolulu, Hawaii, this 18th day of April, 1958.

/s/ KENNETH E. YOUNG,
Attorney for Appellant (Bankrupt).

Acknowledgment of Service Attached.

[Endorsed]: Filed April 18, 1958.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL AND DOCKETING
APPEAL

On the application of Fred Jay Rudmann, Bankrupt above named, made pursuant to the provisions of Rule 73(g) of the Federal Rules of Civil Procedure,

It Is Hereby Ordered that the Bankrupt may have to and including the 16th day of June, 1958, within which to file the record on appeal and to docket the appeal.

Dated at Honolulu, T.H., this 25th day of April, 1958.

/s/ JON WIIG,
Judge of the Above Entitled
Court.

[Endorsed]: Filed April 25, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Hawaii—ss.

I, William F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, numbered from Page 1 to Page 31 consists of a statement of the names and addresses of attorneys of record and of the various original pleadings as hereinbelow listed and indicated:

Trustee's Report on Exempt Property.

Objection by Creditor to Trustee's Determination of Status of Real Property.

Order Sustaining Objection of Creditor.

Petition for Review and Stay Pending Review.

Referee's Certificate on Petition for Review of Order Made by Referee.

Order.

Notice of Appeal.

Bond for Costs on Appeal.

Designation of Record on Appeal and Statement of Points.

Order Extending Time for Filing Record on Appeal and Docketing Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 18th day of June, 1958.

[Seal] WILLIAM F. THOMPSON, JR.
 Clerk,
/s/ By THOS. S. CUMMINS,
 Deputy Clerk.

[Endorsed]: No. 16060. United States Court of Appeals for the Ninth Circuit. Fred Jay Rudmann, doing business as Constructors of Hawaii, bankrupt, Appellant, vs. Alfred E. Linczer, Trustee in Bankruptcy of the Estate of Fred Jay Rudmann, doing business as Constructors of Hawaii, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed: June 20, 1958.

Docketed: June 25, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 16060

FRED J. RUDMANN, dba Constructors of Ha-
wail,

vs.

ALFRED E. LINCZER,

Trustee.

ADOPTION OF STATEMENT OF
POINTS IN TYPED RECORD

Comes now appellant, Fred J. Rudmann and hereby adopts the statement of points on which he intends to rely and the designation of the record on appeal, as set forth and appearing in the typed record filed on April 19, 1958 in the United States District Court for Hawaii.

Dated: July 3, 1958.

/s/ KENNETH E. YOUNG,
Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 7, 1958. Paul P. O'Brien,
Clerk.

No. 16,060

United States Court of Appeals
For the Ninth Circuit

FRED JAY RUDMANN, doing business as
Constructors of Hawaii,

Appellant,

vs.

ALFRED E. LINCZER, Trustee in Bank-
ruptcy of the Estate of Fred Jay
Rudmann, doing business as Con-
structors of Hawaii,

Appellee.

Appeal from the United States District Court
for the Territory of Hawaii.

BRIEF FOR APPELLANT.

KENNETH E. YOUNG,

606 Trustco Building,
250 South King Street,
Honolulu 13, Hawaii,

Attorney for Appellant.

FILED

SEP 24 1958

PAUL P. O'BRIEN, CLERK

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No. 16,060

United States Court of Appeals For the Ninth Circuit

FRED JAY RUDMANN, doing business as
Constructors of Hawaii,

Appellant,

vs.

ALFRED E. LINCZER, Trustee in Bank-
ruptcy of the Estate of Fred Jay
Rudmann, doing business as Con-
structors of Hawaii,

Appellee.

Appeal from the United States District Court
for the Territory of Hawaii.

BRIEF FOR APPELLANT.

JURISDICTION.

On August 6, 1956, Fred Jay Rudmann, Appellant, was adjudicated a voluntary bankrupt by the United States District Court of Hawaii as a Court of bankruptcy under the provisions of Title 11 U.S.C. Section 11. The case was duly referred to the Referee in Bankruptcy of said Court who took jurisdiction pursuant to the powers vested in him by Title 11 U.S.C.

Section 66. The bankrupt in Schedules B-1 and B-5 of his Petition in Bankruptcy, described certain real property held by the bankrupt and his wife "as joint tenants with full rights of survivorship and not as tenants in common" and claimed that said property did not constitute an asset of the bankrupt estate. The trustee in bankruptcy filed with the Referee the trustee's determination that said property was not an asset of the bankrupt estate and that said property was not subject to the jurisdiction of the bankruptcy Court (Record p. 4-8). A creditor objected to the trustee's determination of the status of the real property (Record p. 8). Thereafter, a hearing by the Referee was had upon the said objection of the creditor and the Referee on May 31, 1957 sustained the objection of the creditor and held that the said real property was held by the trustee as tenant in common with the bankrupt's wife and that the bankrupt could not exclude said property from the assets of his estate (Record p. 9). Thereafter and on June 7, 1957 the bankrupt, appellant herein, within the time provided by law and under the authority of Section 39 (c) of the Bankruptcy Act filed a Petition for Review by a Judge of the District Court of Hawaii (Record p. 10). The Referee's Certificate was thereafter filed on June 25, 1957 in the office of the clerk of the United States District Court. On February 10, 1958, after a hearing on the Petition for Review, the Judge of the United States District Court confirmed the Order of the Referee including the said real property as an asset of the bankrupt estate and dismissed

the Petition for Review. Notice of Appeal from this final order of the United States District Judge was taken to this Court within the time provided by law on March 21, 1958.

The jurisdiction of this Court is founded on Title 11 U.S.C. Section 47.

STATEMENT OF FACTS.

The facts are simple and are not disputed (Record p. 13). On August 6, 1956 Fred Jay Rudmann was adjudicated a voluntary bankrupt. His wife, Mae Rudmann, was not a party to the bankruptcy proceeding. In March, 1945, more than eleven years prior to the time that appellant, Fred Jay Rudmann, was adjudicated a bankrupt, the appellant and his wife acquired certain real property used by them as their home and residence. The deed by which they acquired this real property conveyed the property to Fred Jay Rudmann and Mae Rudmann, husband and wife, "as joint tenants with full right of survivorship, and not as tenants in common, their assigns, and the heirs and assigns of the survivor of them" (Record p. 13-17). The bankrupt claimed in his bankruptcy schedules that this real property was not an asset of the bankrupt estate. The trustee in bankruptcy in his report to the Referee dated September 15, 1956 (Record p. 4) took the position that said real property was not an asset of the bankrupt estate. Upon objection by a creditor to the said report of the trustee the Referee ruled that said real property was in-

cludible as an asset of the bankrupt estate (Record p. 9). Following a hearing on a Petition for Review of the Referee's Order the Judge of the District Court sustained the Order of the Referee. That Order of the District Judge is now before this Court on Appeal.

QUESTIONS INVOLVED.

1. Did the District Court in Bankruptcy err in ruling that the real property of the bankrupt and his wife was includible as an asset of the bankrupt estate?

2. Is real property held prior to bankruptcy by husband and wife in Hawaii as "joint tenants with full right of survivorship, and not as tenants in common, their assigns, and the heirs and assigns of the survivor of them" includible in the assets of the bankrupt husband's estate?

SPECIFICATIONS OF ERROR.

1. That the Court of Bankruptcy (Judge of the United States District Court) erred in confirming the Order of the Referee and dismissing the bankrupt's Petition for Review of the Referee's Order dated May 31, 1957.

2. That the Court of Bankruptcy (Judge of the United States District Court) erred in holding as a matter of law that in Hawaii real property held prior to bankruptcy by husband and wife as "joint tenants

with full rights of survivorship and not as tenants in common, their assigns, and the heirs and assigns of the survivor of them" is includible in the assets of the bankrupt husband's estate, and that the trustee in bankruptcy now holds said property as a tenant in common with the bankrupt's wife.

SUMMARY OF ARGUMENT.

The facts are not in dispute. The sole issue is the legal effect in Hawaii of a conveyance of real property to husband and wife as "joint tenants with full rights of survivorship". Appellant maintains that in accordance with the rule at common law a joint tenancy between husband and wife is a tenancy by the entirety, that property held by the entireties is not subject to either the debts of the husband or the wife and therefore does not become a part of the assets of a husband's bankrupt estate. Since the real property in this case was held by husband and wife as tenants by the entirety, even though called a joint tenancy, the property was not part of the bankrupt estate of the husband and Court erred in ruling that it was a part of the bankrupt husband's estate.

ARGUMENT.

1. A CONVEYANCE OF REAL PROPERTY IN HAWAII IN 1945 TO HUSBAND AND WIFE "AS JOINT TENANTS WITH FULL RIGHTS OF SUIVIVORSHIP, AND NOT AS TENANTS IN COMMON, THEIR ASSIGNS AND THE HEIRS AND ASSIGNS OF THE SURVIVOR OF THEM" VESTED IN THEM AN ESTATE BY THE ENTIRETY.

At common law the same words of conveyance which would make other grantees joint tenants will make a husband and wife tenants by the entirety. 26 Am. Jur. 696, Note 12. The common law of England as ascertained by English and American decisions is the common law of Hawaii. Sec. 1-1 R.L. Hawaii 1955.

It appears well settled in Hawaii that prior to 1945 and up to the present time tenancy by the entirety has existed as a legal and recognized estate in property.

Sec. 345-1 R.L. Hawaii, 1955 provides as follows:

"All grants, conveyances and devises of land, or of any interest therein, made to two or more persons, shall be construed to create estates in common and not in joint-tenancy or *by entirety*, unless it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint-tenancy or by entirety; provided, that the foregoing provisions shall not apply to grants, conveyances or devises to executors or trustees." (Emphasis added.)

Sec. 345-2 R.L. Hawaii, 1955 provides as follows:

"Land, or any interest therein, or any other type of property or property rights or interests or interest therein, may be conveyed by a person to himself and another, or others, as joint tenants,

or to himself and his spouse as tenants by the entirety, or by tenants in common to themselves or themselves and others as joint tenants, without the necessity of conveying through a third party, and each such instrument shall be construed as validly creating a joint tenancy or a tenancy by the entirety, as the case may be, if the tenor of the instrument manifestly indicates an intent to create such tenancy.” (Emphasis added.)

It appears to be well established case law in Hawaii that property granted to a husband and wife vests in them an estate by the entirety. *Paahana v. Bila*, 3 Haw. 725 (1876); *Kenway v. Notely*, 5 Haw. 123; *Wailehua v. Lio*, 5 Haw. 519 (1886); *Kuanalewa v. Kipi*, 7 Haw. 575 (1889); *Robinson v. Aheong*, 13 Haw. 196 (1900). There are no Hawaiian cases construing the legal effect of the exact words used in the case at bar.

In the *Paahana* case, *supra*, which involved a grant to a husband and to his wife, the Court said:

“They are not properly joint tenants of such lands, since, though there is a right of survivorship neither can convey so as to defeat this right in the other. Each takes an entirety of the estate.”

In the *Robinson* case, there was a device by will to Kaahinu and to two grandchildren, the two grandchildren happening to be husband and wife. As to the interest of the two grandchildren, Kaahinu having predeceased the testator, the Court stated:

“It is agreed that these (the two grandchildren) being husband and wife, took neither as

tenants in common, nor as joint tenants, but by the entirety.’’

A conveyance to husband and wife as joint tenants has been held in other jurisdictions to create a tenancy by the entireties.

Settle v. Settle, 56 App. D.C. 50, 8 F. 2d 911, 43 A.L.R. 1079.

Commissioner of Internal Revenue v. Hart, 76 F. 2d 864, declaring Michigan law and following *Hoyt v. Winstanley*, 221 Mich. 515, 191 N.W. 213;

Heath v. Heath, 189 F. 2d 697 declaring District of Columbia law and following *Settle v. Settle*, 56 App. D.C. 50, 8 F. 2d 911, 43 A.L.R. 1079;

Laun v. De Pasqualte, 254 Ky. 314, 71 S.W. 2d 641;

Hoag v. Hoag, 213 Mass. 50, 99 N.E. 521, Ann. Cas. 1913 E, 886;

Childs v. Childs, 293 Mass. 67, 199 N.E. 383, referring to a tenancy by entireties as a modified form of joint tenancy;

Jurewicz v. Jurewicz, 317 Mass. 512, 58 N.E. 2d 832;

Pineo v. White, 320 Mass. 487, 70 N.E. 2d 294;

Cummings v. Wadja, 325 Mass. 242, 90 N.E. 2d 337;

Hoyt v. Winstanley, 221 Mich. 515, 191 N.W. 213.

In *Settle v. Settle*, supra, a leading case, a conveyance of land to husband and wife as *joint tenants*

was held to create a *tenancy by the entirety*. This result was reached *despite the enactment of the Married Woman's Act* in the District of Columbia.

That Court it is submitted, correctly summarized the law as follows:

“We agree with the decision of the lower court. In our opinion, under such conveyances, husband and wife take as tenants by the entirety at common law, and this rule still prevails in the District of Columbia. ‘Undoubtedly, at common law, husband and wife did not take, under a conveyance of land to them jointly, as tenants in common or as joint tenants but each became seized of the entirety, *per tout*, *et non per my*, the consequence of which was that neither could dispose of any part without the assent of the other, but the whole remained to the survivor under the original grant.’ . . .

“The tenancy by entireties is essentially a joint tenancy, modified by the common-law theory that husband and wife are one person. 1 Tiffany Real Property § 194. *One of the principal common-law rules of construction in relation to such tenancy is that the same words of conveyance which would make other grantees joint tenants will make husband and wife tenants by entireties. . . . Hence, at common law, under a conveyance to husband and wife as ‘joint tenants, they do not take as simple joint tenants, but as tenants by entireties. . . .’* (Emphasis added.)

“It is plain that, if the common-law doctrine of tenancy by entireties, as above defined, prevails in the District of Columbia, the appellant is not entitled to a partition of these lands. It cannot be disputed that this doctrine was im-

ported into the early common law of the District, but it has been contended that it was first modified by the Married Woman's Act, and afterwards abolished by § 1031 of the District Code.

“In *Loughran v. Lemmon*, 19 App. D.C. 141, 147, this court said: ‘There is nothing in the Married Woman's Act, in force in this District, that in any way defeats or destroys the common-law estate by entireties, as that estate subsists between husband and wife by purchase. The estate exists as at the common law, unaffected by statute.’

“Subsequently to the decision just cited Congress enacted § 1031 of the District Code, reading as follows:

‘Sec. 1031. Tenancies in Common and Joint Tenancies. Every estate granted or devised to two or more persons in their own right, including estates granted or devised to husband and wife, shall be a tenancy in common, unless expressly declared to be a joint tenancy; but every estate vested in executors or trustees, as such, shall be a joint tenancy, unless otherwise expressed.’

“This enactment was in force in the District at the date of the conveyances now in question, and it is contended that it effectually abolished tenancy by entireties within the District of Columbia. We cannot agree with this contention. The section does no more than provide that express terms are necessary in order to create a joint tenancy rather than a tenancy in common, whether in conveyances to strangers or to husband and wife, *but it makes no attempt to define or change the incidents or effect of either of these kinds of tenancy*. Consequently such tenancies, when created consistently with the requirements

of the section have the same effect as before its enactment. If Congress had intended to abolish tenancies by entireties in the District, it is safe to assume that the intention would have been expressed in more specific terms than those used in § 1031, especially in view of the repeated decisions of the courts of the District upon the subject."

The annotator in 43 A.L.R. sums up the case law on page 1082 as follows:

"The decisions in the jurisdictions wherein tenancy by entireties is still recognized are practically unanimous to the effect that a statute providing generally that a devise or conveyance to two or more shall presumptively create a tenancy in common, and not a joint tenancy, have no application to a devise or conveyance to husband and wife, and that such a devise or conveyance creates a tenancy by entireties as at common law."

-
2. WHERE HUSBAND AND WIFE HOLD REAL PROPERTY AS TENANTS BY THE ENTIRETY, NO INTEREST IS SUBJECT TO LEVY AND EXECUTION AND NO INTEREST THEREIN IS VESTED BY OPERATION OF LAW IN THE TRUSTEE IN BANKRUPTCY UNDER TITLE 11 U.S.C. SEC. 110 (a) (5).

It is well settled that no portion of an estate by entireties passes to the trustee in bankruptcy of either of the spouses as an asset of the bankrupt.

6 Am. Jur. p. 599, Sec. 154;

See annotation 47 A.L.R. 437;

In re Utz, (D.C. Md. 1934) 7 Fed. Supp. 612,
26 A.B.R. (N.S.) 101;

Culton v. Kearns, (C.C.A. 4th 1925) 8 Fed.
2d 437.

This point did not appear to be disputed by the objecting creditor in his memoranda of law presented to the referee nor by the referee in his decision. (Note: These documents are not included in the record but mention is herein made to obviate the present necessity of further argument on this point.)

CONCLUSION.

Since under Hawaiian law the bankrupt and his wife held the real property as tenants by the entireties neither could alienate nor encumber the property alone without the agreement by the other. No interest in the property therefore is vested by law in the trustee in bankruptcy under Sec. 70 (a) (5) of the Bankruptcy Act. The Order of the District Court Judge confirming the Order of the Referee Sustaining the Creditor's objection should be reversed and set aside.

Dated, Honolulu, Hawaii,
September 10, 1958.

Respectfully submitted,
KENNETH E. YOUNG,
Attorney for Appellant.

No. 16062 ✓

United States
Court of Appeals
for the Ninth Circuit

JAMES N. GREER, Appellant,

VS.

MARY SCHAAF GREER, Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Nevada

FILED

SEP 19 1958

PAUL P. O'BRIEN, CLERK

No. 16062

United States
Court of Appeals
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JAMES N. GREER, Appellant,

vs.

MARY SCHAAF GREER, Appellee.

Transcript of Record

Appeal from the United States District Court
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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* Page numbers appearing at bottom of page of Original Transcript of Record.

V.

By the laws of the State of Virginia, the interest upon a judgment runs at Six Per (6%) Cent per annum. [2]

Second Claim For Relief:

I.

Plaintiff alleges, that plaintiff is a citizen of the State of Virginia and defendant is a citizen of the State of Nevada.

II.

That on or about the 13th day of July, 1949, plaintiff and defendant for a valuable consideration, entered into an agreement in writing, a copy of which is attached hereto as Exhibit A.

III.

Plaintiff has duly performed all of the conditions of such agreement on her part.

IV.

Defendant has failed and neglected to perform the conditions of the agreement on his part in that he has failed to pay to the plaintiff the sum of \$1106.05 due to plaintiff under the agreement, paragraph six thereof, although plaintiff has demanded payment thereof.

V.

That in accordance with paragraph four of said agreement defendant has failed and neglected to perform the conditions upon his part and has failed to pay to the plaintiff the sum of \$27,600.00 due the

plaintiff under the agreement, as of the 5th day of March 1956, although plaintiff has demanded payment thereof.

VI.

All of the payments as aforesaid have accrued since June 5, 1952.

Wherefore plaintiff demands judgment in the sum of \$10,357.34, plus interest and costs on the first claim for relief, and \$1106.05 and \$27,600.00 plus interests and costs of [3] this action, on the second claim for relief. [4]

/s/ JAMES W. JOHNSON, JR.

Attorney for Plaintiff.

EXHIBIT "A"

AGREEMENT

This Agreement, made in duplicate, this 13th day of July, A. D. 1949, by and between James N. Greear, Jr., hereinafter referred to as the husband, and Mary Schaaff Greear, hereinafter referred to as the wife, witnesseth:

Whereas the parties hereto are husband and wife, and unfortunate differences and disputes have arisen between them, and they are now living separate and apart; and

Whereas three children have been born of their marriage; namely, Mary Alese Greear Wilson, who is now of full age and married; James N. Greear, III, born January 22, 1930, and Betsy Gene Greear, born January 4, 1932; and

Exhibit "A"—(Continued)

Whereas the said parties are desirous of amicably settling all questions, rights, titles, interests and obligations in relation to any and all property now owned or hereafter acquired by either of them and in relation to the support, maintenance, education and custody of their said two minor children;

Now, Therefore, in consideration of the premises and in consideration of the covenants and agreements hereinafter more specifically set forth, each of the said parties renounces, quit-claims and conveys any right or title to any of the estate now owned or possessed by the other or that may be hereafter acquired in any way by the other; and the said husband does hereby, so far as the covenants and agreements hereinafter contained are or ought to be performed or observed by him, his heirs, executors or administrators, covenant with the said wife, her heirs, executors and administrators, and said wife does hereby, so far as the covenants and agreements hereinafter contained are or ought to be performed by her, her heirs, executors or administrators, covenant with the said husband, his heirs, executors and [5] administrators, in the manner following, that is to say:

1. The wife shall have the custody and control of their said minor children; namely, James N. Greear, III, and Betsy Gene Greear, with the right of the husband to visit the said children at any reasonable times and places.

2. The parties agree that as soon as practicable after the execution and delivery of this agreement,

Exhibit "A"—(Continued)

Lot 28, Square 1937, known as premises 3532 Edmunds Street, Northwest, District of Columbia, which is titled in their names as tenants by the entirety, shall be sold and conveyed by them and the wife shall receive one-half of the net proceeds thereof, as her sole and separate estate, and the husband shall receive the remaining one-half of the net proceeds thereof. The wife shall have sole possession and control of the said property until contracts have been made for repairs and renovations needed to make the same saleable, or until the same is sold and conveyed to the purchaser, if the husband and wife mutually agree to sell it without making any repairs or renovations. As soon as such contracts shall have been executed by the husband, the wife agrees to vacate the premises. The husband agrees to advance the money necessary to make such repairs and improvements and the cost of such repairs and improvements, including his advances therefor, shall be taken into consideration in determining the net proceeds from the sale of the said property; provided, however, that any and all contracts for such repairs and improvements and the amount or amounts to be incurred therefor shall be subject to the joint consent and approval of the husband and wife.

3. The husband hereby sells, sets over, transfers and assigns to the wife all of his right, title and interest in and to any and all household goods, furniture and chattels located [6] in and upon the said premises known as 3532 Edmunds Street,

Exhibit "A"—(Continued)

Northwest, District of Columbia, except the following personal articles belonging to the husband:

1. The large (9' x 12') oriental rug used in the dining room,
2. The antique bed, the bedside table, the straight chair, the rectangular table, and the chair set in the room he is now occupying,
3. The day bed in the back room on the second floor,
4. The walnut chest of drawers and mirror in the room he is now occupying,
5. The desk, desk chair, couch, arm chair in the study, including two (2) lamps purchased for this room at the same time that it was furnished,
6. One set of "hunt" dinner plates which were presented to him by Dr. Leibell,
7. One set of dinner plates of the Episcopal High School Centennial,
8. One red decanter and matching glasses given to him by Dr. Thomas Lowe,
9. Sets of cocktail and Old Fashion glasses presented to him by Drs. Herbst and Howell which are now in his possession,
10. Any pictures or photographs belonging to him personally, including the hunt photographs and the hunt prints that are not in the recreation room, and any college pictures or photographs of his friends,

Exhibit "A"—(Continued)

11. The small dining table and armchair now in the recreation room,

12. All of his clothing and personal belongings, including medical, hunt, and all books purchased by him (excluding Encyclopedia Britannica and Journeys through Book Land and other children's books) or presented to him by friends for his personal use, and his fishing tackle, guns, gun case and golf clubs,

13. The brass kettle standing by the fireplace in the sitting room which belongs to his family,

14. The mirror now in the back room on the second floor which goes with the day bed in Item 3,

15. Two (2) woolen laprobes presented to him by friends, [7]

16. All furniture in the recreation room except one chair,

17. The silver vase presented to him by Dr. John Wheeler,

18. The carving set and steak sets presented to him by Dr. John Allen Talbot,

19. All of the silver bread and butter plates presented to him by his family,

20. The mirror in the recreation room presented to him by Dr. McLeod,

21. The bed spread presented to him by Mrs. William Evans,

22. One of the end tables in the living room.

Exhibit "A"—(Continued)

The husband agrees to remove his said property from said premises by August 1, 1949, and the wife agrees not to place any unreasonable obstacles in the way thereof.

4. The husband promises and agrees to pay to the wife for her own support and maintenance the sum of Five Hundred (\$500.00) Dollars per month on the fifth day of each and every month commencing as of the fifth day of June, 1949, and continuing during their joint lives as long as she remains unmarried to another, but the obligation of the husband to make such payments shall terminate as of the date of the wife's death or marriage to another, and shall also terminate upon the husband's death, without any liability on the part of his estate or personal representative, to make such payment after his death. Whenever the wife becomes obligated to pay an income tax thereon and the husband becomes entitled to an income tax deduction therefor, the said payment of Five Hundred (\$500.00) Dollars per month shall be increased to Six Hundred (\$600.00) Dollars per month and shall continue at the rate of Six Hundred (\$600.00) Dollars during any period that the wife is required to pay an income tax thereon and the husband is entitled to an income tax deduction therefor. However, if and when the husband's annual "net income" (meaning by [8] that phrase his gross income from all sources of his income, less his usual, ordinary and reasonable office expenses and income, tax payments by him for that year) is less than Seventeen Thousand

Exhibit "A"—(Continued)

Five Hundred (\$17,500.00) Dollars in any calendar year, the monthly payments to the wife for the succeeding calendar year shall be that proportion of Five Hundred (\$500.00) Dollars or Six Hundred (\$600) Dollars (whichever amount is then applicable) that Seventeen Thousand Five Hundred (\$17,500) Dollars bears to the husband's annual "net income" during said immediately preceding calendar year in which his "net income" is less than Seventeen Thousand Five Hundred (\$17,500) Dollars, but the minimum payments shall be Three Hundred (\$300) Dollars per month as long as the husband's annual "net income" equals or exceeds Seven Thousand Two Hundred (\$7,200) Dollars per calendar year, and whenever the husband's annual "net income" equals or exceeds Seventeen Thousand Five Hundred (\$17,500) Dollars in any calendar year, the monthly payments to the wife for that year and each and every succeeding year in which the husband's annual "net income" equals or exceeds Seventeen Thousand Five Hundred (\$17,500) Dollars shall be Five Hundred (\$500) Dollars or Six Hundred (\$600) Dollars per month (whichever amount is then applicable according to the above provisions in relation to income taxes thereon) on the fifth day of each and every month commencing as of the fifth day of January of each of the years involved. If, by reason of ill health, or any other cause, the husband's annual "net income" should be less than Seven Thousand Two Hundred (\$7,200) Dollars per year, the rate of monthly payments by the husband to the wife shall be one-half

Exhibit "A"—(Continued)

of his annual "net income," except that if that event occurs at any time during the time the husband is obligated for the support, maintenance and education of their two minor children or either of [9] them, as hereinafter provided in paragraphs 5 and 6 of this agreement, the payments by the husband to the wife shall be reduced to one-third of his annual "net income" during the period of time that he is so obligated for the support, maintenance and education of their said children or either of them. Whenever the husband's annual "net income" is less than Seventeen Thousand Five Hundred (\$17,500.) Dollars in any calendar year or less than Seven Thousand Two Hundred (\$7,200) Dollars in any calendar year, the husband shall furnish the wife, her agent or attorney, an itemized statement of his annual "net income" and shall permit the wife, her agent or attorney, to make a detailed examination and audit of his books and records and income tax returns for the calendar years involved for the purpose of determining the accuracy of the itemized statement furnished by the husband to the wife, her agent or attorney. The wife agrees to sign a joint income tax return with the husband, at his request, until such time as she is required to make a separate return and pay a separate income tax on the money paid by the husband to her.

5. The husband will pay directly to the college for tuition, books, the usual college fees and room and board at the college for James N. Greear, III, so long as he continues to be a student at Virginia

Exhibit "A"—(Continued)

Military Institute, or other college approved by the husband, and in addition, will pay for his medical and dental care and transportation to and from college, not exceeding twice a year each way, and will pay directly to James N. Greear, III, beginning as of July 5, 1949, the sum of Forty (\$40) Dollars for his allowance, including clothing, on the fifth day of each month until July 5, 1950, and beginning as of July 5, 1950, the sum of Fifty-five (\$55) Dollars therefor on the fifth day of each and every month until the end of the college year after he attains the age of twenty-one years, that is, until June 20, 1951, and [10] while the husband intends to help his son financially as long as he remains in college and maintains a satisfactory standing, the husband does not hereby obligate himself to do so after his son attains the age of twenty-one years, other than as above provided. If the husband fails to pay for the education and maintenance of James N. Greear, III, as above agreed, and the wife pays therefor, the husband promises and agrees to reimburse the wife for any and all payments made by her on account thereof, not exceeding the obligations assumed by the husband, as above provided.

6. The husband will pay directly to the school for tuition, books and the usual school fees for Betsy Gene Greear as long as she continues to be a student at the National Cathedral School for Girls, or other school approved by the husband, and thereafter to pay for tuition, books, the usual college fees and transportation to and from college, not

Exhibit "A"—(Continued)

exceeding twice a year each way, and, if she attends college outside of the District of Columbia, for her room and board, and, while she lives with her mother, during the period up to her twenty-first birthday that she is attending school or college, will pay her mother for her room and board the sum of Fifty (\$50) Dollars per month beginning as of July 5, 1949, and, in addition will pay for her medical and dental care and will pay directly to Betsy Gene Greear beginning as of July 5, 1949, the additional sum of Fifty-five (\$55) Dollars for her allowance, including clothing, on the fifth day of each month until the end of the college year after she attains the age of twenty-one years, that is, until June 30, 1953, and while the husband intends to help his said daughter financially so long as she remains in college and maintains a satisfactory standing, the husband does not hereby oblige himself to do so after his said daughter attains the age of twenty-one years, other than as above provided. If the husband fails to pay [11] for the education and maintenance of Betsy Gene Greear, as above agreed, and the wife pays therefor, the husband promises and agrees to re-imburse the wife for any and all payments made by her on account thereof, not exceeding the obligations assumed by the husband, as above provided.

7. The husband promises and agrees to have and keep the wife designated as the beneficiary of his National Service Life Insurance in the face amount of Ten Thousand (\$10,000) Dollars and to have the

Exhibit "A"—(Continued)

wife designated irrevocably as the beneficiary of other insurance now on his life in the face amount of Fifteen Thousand (\$15,000) Dollars, such policies to be selected by him, and to have their three children named the contingent beneficiaries, share and share alike, of each and all of the said policies, in the event the wife predeceases the husband. At the time he receives his share of the proceeds from the sale of the house as provided in paragraph 2 above, the husband promises and agrees to deliver possession to the wife of each and all of the policies so designating her beneficiary and their children contingent beneficiaries in the total amount of Twenty-five Thousand (\$25,000) Dollars. (It is understood that this cannot be done until sufficient payment has been made on the loan at the Riggs National Bank to release the said policies.) And to keep and maintain each and all of the said policies in the aggregate sum of Twenty-Five Thousand (\$25,000) Dollars in full force and effect by paying any and all premiums thereon when and as the same become due and payable. In the event the husband and wife are divorced, the husband promises and agrees to substitute other insurance now on his life in the face amount of Ten Thousand (\$10,000) Dollars for his said National Service Life Insurance in the face amount of Ten Thousand (\$10,000) Dollars and, upon the surrender by the wife to the husband of his said National Service [12] Life Insurance in the face amount of Ten Thousand (\$10,000) Dollars, the husband promises and agrees to deliver possession to the wife of said

Exhibit "A"—(Continued)

other insurance now on his life in the face amount of Ten Thousand (\$10,000) Dollars and, upon the surrender by the wife to the husband of his said National Service Life Insurance in the face amount of Ten Thousand (\$10,000.00) Dollars, the husband promises and agrees to deliver possession to the wife of said other insurance now on his life in the face amount of Ten Thousand (\$10,000) Dollars in which the wife is then designated irrevocably as the beneficiary in the face amount of Ten Thousand (\$10,000) Dollars, and their three children are designated contingent beneficiaries, share and share alike, in the event the wife predeceases the husband, and to keep and maintain such substituted life insurance in full force and effect by paying any and all premiums thereon when and as the same become due and payable.

8. The husband promises and agrees to pay any and all presently outstanding bills for gas, electricity, telephone, milk and groceries, excepting any portion of such bills that may have been incurred on and after June 5, 1949, which portion shall be payable by the wife, and the husband further promises and agrees to pay any unpaid taxes on the premises known as 3532 Edmunds St., Northwest, District of Columbia, and each and all of the following bills that may not have been already paid by him:

Virginia Military Institute.....	\$38.00
Cathedral School for Girls.....	19.00
Parkway Cleaners	75.25

Exhibit "A"—(Continued)

Gude	24.50	
Spunds	342.16	
Martin	12.17	
Hintlian	169.07	
Mary Elizabeth	120.25	
Colonial Oil	22.20	
Woodward and Lothrop.....	113.18	
Jelleff	45.00	
Huberts	126.60	[13]

The husband does not assume liability for the payment of any bills hereafter incurred in connection with the wife's occupancy of 3532 Edmunds Street, Northwest, or for any other bills hereafter incurred by the wife.

9. The wife assumes and agrees to make a separate return and to pay the personal property taxes that will accrue for the taxable year July 1, 1949, to June 30, 1950, and thereafter, against the personal property received by her under paragraph 3 of this agreement.

10. The husband promises to pay to Arthur J. Hilland, Esquire, the sum of One Thousand (\$1,000.00) Dollars as and for a counsel fee for services rendered to the wife.

11. The husband assumes and, after consummation of the sale of the house under paragraph 2 above, agrees to apply his share of the proceeds from the sale of the house on the principal and interest of a Twenty-one Thousand (\$21,000) Dollar promissory note, held by Riggs National Bank, of

Exhibit "A"—(Continued)

which he and the wife are joint makers, and the husband will assume sole liability for the payment of the balance, if any.

12. In consideration of the foregoing, the wife hereby waives, releases and renounces all claims, demands and causes of action which she now has or may hereafter have against the husband for any further support and maintenance and agrees to make no claim to the proceeds of any life or other insurance now or hereafter payable to the husband, his estate, personal representatives or to any beneficiaries in any way designated by him except as hereinbefore provided in paragraph 7 hereof.

13. Each party agrees that he or she will not contract any debts, charge or liability for which the other party might be held liable and that each party will at all times be ever free, harmless and indemnified from any and all debts, charges and [14] liabilities hereafter contracted by the other party.

14. Each of the parties hereto agrees that in the event of the death of the other, the surviving party hereby waives any and all dower, courtesy or marital rights that either party may have to share or participate in any real or personal property of the other at death.

15. Each party shall, upon the request of the other, execute, acknowledge and deliver any and all deeds or instruments of release or conveyance that may be necessary in order to enable the other to sell, convey or otherwise dispose of his or her own property, real or personal, including any and all

Exhibit "A"—(Continued)

property acquired by either of them under the provisions of this agreement, free from any apparent right or interest therein.

In Witness Whereof, the said parties have hereto set their hands and seals on the day and year aforesaid.

[Seal] /s/ JAMES N. GREEAR, JR.,

[Seal] /s/ MARY SCHAAFF GREEAR,

Witness:

 /s/ G. BOWDOIN CRAIGHILL,

 /s/ ARTHUR J. HILLAND.

District of Columbia—ss.

I, Elizabeth Maynard, a Notary Public in and for the District aforesaid, hereby certify that James N. Greear, Jr., who is personally well known to me as the person described in and who executed the foregoing agreement dated the 13th day of July, 1949, personally appeared before me in said District and acknowledged the said agreement to be his act and deed.

Given under my hand and seal this 13th day of July, 1949.

[Seal] /s/ ELIZABETH MAYNARD,

Notary Public, D. C. My Commission expires: 9/14/53. [15]

District of Columbia—ss.

I, Genevieve M. Foreman, a Notary Public in and

Exhibit "A"—(Continued)

for the District aforesaid, hereby certify that Mary Schaaff Greear, who is personally well known to me as the person described in and who executed the foregoing agreement dated the 13th day of July, 1949, personally appeared before me in said District and acknowledged the said agreement to be her act and deed.

[Seal] /s/ GENEVIEVE M. FOREMAN,
Notary Public, D. C. My Com-
mission expires: 9/1/52. [16]

[Endorsed]: Filed April 17, 1956.

[Title of District Court and Cause.]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon James W. Johnson, Jr., plaintiff's attorney, whose address is 206 North Virginia Street, P. O. Box 316, Reno, Nevada, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal] OLIVER F. PRATT,
Clerk of Court,
/s/ By BERNARD SUPERAFF,
Deputy Clerk.

Date: April 17, 1956. [17]

Return on Service of Writ

Mary Schaaff Greear vs. James N. Greear, No.
1261.

United States of America,
District of Nevada—ss.

I hereby certify and return that I served the annexed Summons on the therein-named James N. Greear by handing to and leaving a true and correct copy thereof together with copy of Complaint and Agreement with Dr. James N. Greear personally at Room 302, Professional Bldg., 150 North Center Street, at Reno, Nevada in the said District at 10:45 a.m. on the 18th day of April, 1956.

/s/ CEDRIC E. STEWART,

United States Marshal. [18]

Marshal's fees \$2.00.

[Endorsed]: Filed April 19, 1956.

[Title of District Court and Cause.]

ANSWER

For answer to the Complaint, defendant says:

First Claim For Relief

I.

It is denied that plaintiff is a citizen of the State of Virginia. The other averments of paragraph I are admitted.

II.

It is admitted that on February 23, 1955 judgment was entered in favor of plaintiff against this

defendant, in an action in the Circuit Court of Bath County, State of Virginia, in the amount of \$10,-357.34, plus interest on specified amounts, and costs.

III.

This defendant is without knowledge or information sufficient to form a belief as to the truth of the averment of paragraph III.

IV.

The averment of paragraph IV is denied. [19]

V.

The averment of paragraph V is admitted.

Second Claim For Relief

I.

It is denied that plaintiff is a citizen of Virginia. It is admitted that defendant is a citizen of Nevada.

II.

The averments of paragraph II are admitted.

III.

It is denied that all the conditions of said agreement have been performed.

IV.

The averments of paragraph IV are denied.

V.

It is denied that defendant owes plaintiff \$28,200 as of the 5th day of April, 1956, and it is denied that defendant has failed and neglected to perform the conditions of said agreement on his part to such an extent as would result in said amount being owed by defendant to plaintiff as of April 5, 1956.

VI.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment of paragraph VI.

Separate Answer and Affirmative Defense

As a separate answer and affirmative defense to each of the plaintiff's alleged claims for relief, defendant says:

I.

He has paid to plaintiff the following amounts:

1954:

February 3	\$75.00	
February 8	75.00	
April 9	75.00	[20]
May 13	75.00	
October 6	75.00	
November 12	75.00	
December 15	75.00	

1955:

January 15	\$75.00
February 28	75.00
March 29	75.00
April 30	75.00
June 27	75.00
October 17	150.00

II.

Paragraph 4 of the agreement, Exhibit A, provides that payments by defendant under that agreement shall be determined in amount by the basis of

defendant's annual net income. Defendant says that in no year since July 5, 1950 has his annual net income, as determined under the laws of the State of Nevada (of which state defendant has been a citizen and resident since said date), been in such amount as to require payments in the maximum amount stated in said agreement, and defendant avers that his annual net income since said date and continuing until April, 1956, has been in an amount which would reduce the payments to be made by him under said agreement to the minimum amount specified in paragraph 4 thereof, which defendant believes, and therefore avers, is not the amount now being claimed by plaintiff in this action.

III.

Defendant avers that all the conditions precedent to indebtedness or obligation by this defendant under paragraph 6 of said agreement were not performed.

Wherefore, defendant prays that plaintiff take nothing by her Complaint and that defendant have judgment dismissing said Complaint and for his costs herein incurred.

VARGAS, DILLON &
BARTLETT,

/s/ By ALEX A. GARROWAY,
Attorneys for Defendant. [21]

Acknowledgment of Service Attached.

[Endorsed]: Filed May 8, 1956.

[Title of District Court and Cause.]

PRETRIAL ORDER

Pursuant to notice pretrial conference in the above entitled matter was had this 18th day of June, 1956, James W. Johnson, Jr., appearing for the plaintiff, and Alex A. Garroway of the law firm of Vargas, Dillon, Bartlett and Garroway appearing for the defendant.

Jurisdiction

This Court has jurisdiction under the provisions of Section 1441, Title 28, United States Code, there being a diversity of citizenship between the parties and the amount in controversy being over \$3,000, exclusive of interest and costs.

Nature of the Case

This case grows out of a separation and property agreement made and entered into between the parties as husband and wife of date July 13, 1949, upon the judgment that was rendered thereon in the State of Virginia on the 23rd day of February, 1955, and the accruals of money payments alleged to be due under the terms of the agreement subsequent to the entry of the Virginia judgment.

Agreed Facts

The execution of the agreement attached to the complaint, and the entry of the Virginia judgment is admitted. It is also admitted that certain payments have been made by the [22] defendant to the plaintiff under the terms of the agreement, namely,

\$1,125. The parties agree on the costs incident to the Virginia judgment, the sum of \$99.20. It is also agreed that the defendant has paid nothing on plaintiff's judgment, and that under the terms of the agreement certain additional sums of money have accrued to plaintiff, the exact amount to be determined upon two facts, namely, the yearly net earnings of defendant plus the application of either plaintiff's or defendant's construction of the payment provisions of the contract. It is agreed that somewhere along the line defendant is to receive credit for the sum of \$1,125.

Disputed Matters

The present controversy centers around the manner of computation of the moneys due from defendant to the plaintiff, and that in turn depends upon the construction of the terms of the agreement of July 13, 1949. It would appear that the Virginia Court construed that agreement in the Virginia action, in which action, the Court is advised, the defendant seriously contested. The Court does not have a copy of this judgment so cannot say at this time how that Court did construe the terms of the agreement. Time for appeal being past it would appear that the parties were bound by the Virginia interpretation. The plaintiff asserts that she has performed all of the conditions precedent to the enforcement of the agreement, and it would appear that the Virginia Court so found. The defendant, on the other hand, takes the position that the conditions were not performed, citing the placing of their child in a school he did not approve.

Comment

The Court at this point makes the following observations:

1. In this action and so far as the plaintiff seeks judgment for the amount of the Virginia judgment, plus costs and interest, the defendant is bound by the construction of the [23] agreement adopted by the Virginia Court.

2. That as to the sums of money alleged by plaintiff to have accrued under the terms of the agreement subsequent to the entry of the judgment the construction of the Virginia Court should also apply.

3. The parties have construed the provisions of the agreement each to his own advantage and on this basis have tentatively computed the amount of money due plaintiff, these figures naturally being at considerable variance.

4. The opposing methods of computation adopted by the parties rest upon their interpretation of the agreement relating to defendant's "net earnings".

5. The defendant raises the question of the effect of the community property law in relation to arriving at his net earnings, asserting that plaintiff makes her computations on defendant's total net earnings, whereas by reason of the community property law the starting point should be one-half of the total net earnings.

Computations

Since each party has a definite theory of how the

payments should be computed then it is a routine matter for each to prepare a chronological schedule of moneys due from defendant under the terms of the agreement as he or she may interpret its provisions, provided, of course, that the parties can agree as to an "earning" figure for the years involved.

Conclusion

So far as indicated at this time the entire matter will be submitted at time of trial to the Court for its determination solely upon the agreement and judgment herein referred to, no witnesses or other documentary evidence being contemplated. There being no questions of fact involved the determination of the case depends solely upon questions of law. Due to the somewhat peculiar factual background of this case this has [24] resulted in a rather unusual pretrial and the usual pretrial "order" is not as applicable as, for instance, in the usual negligence case. However, the order is entered in conventional form for what it is worth, the Court realizing that much that has been said is the product of the Court thinking out loud.

Order

Pursuant to discussion and stipulation of counsel and on the basis of the foregoing comment, it is Ordered as follows:

1. That the foregoing constitutes the pretrial order in this matter, subject to the right of respective counsel to suggest within ten days from this date any necessary or appropriate changes so as to

conform to the pretrial discussion. None Being Offered the Order Will Stand As Final and in Lieu of the Pleadings. Copies of any proposed changes must be served on counsel for the opposite party who shall have five days from receipt thereof to make and file his consent, or opposition, to such proposed changes, and/or to offer such amendments as deemed proper. It is suggested that counsel confer and agree on changes, reporting to the Court the (1) changes agreed on and proposed; (2) changes not agreed to.

2. That counsel file their memorandum of points and authorities on the law of the case as developed at the pretrial conference, which must also cover any potentially controversial question of admission of evidence, with the Court five (5) days prior to trial date.

3. That the paragraph I of the complaint be and it is hereby amended, pursuant to stipulation, by striking the word "Virginia" in line 13, and inserting in lieu thereof the words "District of Columbia."

4. The parties having waived a jury trial the matter is set down for trial before the Court on October 15th and 16th, 1956. [25]

5. That at such time as the "computations" of moneys due under the parties opposing theories have been prepared each shall deliver a copy to opposing counsel and to the Court.

6. That counsel make every effort to bring about an "out of court settlement" of this matter.

Dated at Carson City, Nevada, this 18th day of June, 1956.

/s/ JOHN R. ROSS,
United States District Judge.

[Endorsed]: Filed June 21, 1956. [26]

[Title of District Court and Cause.]

DECISION

The plaintiff here seeks to recover against the defendant on two separate claims. The first claim seeks recovery in the sum of \$10,357.34 "plus interest on certain specified amounts on certain specified dates, and costs" based upon a judgment entered in the Circuit Court of Bath County, State of Virginia, on the 23rd day of February, 1955, which judgment itemizes the specific amounts and the specific dates from which interest is to be computed, the total of which is to be added to the sum of \$10,357.34, together with costs in the amount of \$99.20, and interest thereon at six (6%) percent per annum.

In her second claim plaintiff seeks recovery under the terms of a property settlement agreement entered into between her and her former husband, defendant herein, on the 13th day of July, 1949, (1) of the sum of \$1106.05 advanced by her for the education of a daughter of the parties, Betsy Gene

Greear, which amount plaintiff alleges is now due her from the defendant under Paragraph 6 of the agreement, Exhibit 1; and (2) of the sum of \$27,-600.00 alleged to be due for unpaid sums of money pursuant to Paragraph 4 of the agreement, Exhibit 1. [132]

It is apparent from the judgment above referred to, Exhibit 2, that it included all moneys due from all items mentioned in Paragraphs 4 and 6 of the agreement, to and including the month of May, 1952. Plaintiff's "second claim" concerns us only as it relates to the period subsequent to that time.

The following factual statement forms the backdrop of this domestic tragedy. Mary Schaff Greear, the plaintiff, and James N. Greear, Jr., the defendant, were formerly husband and wife, residing in Washington, D.C. Certain unfortunate differences resulted in their separation, and, on July 13, 1949, in Washington, D.C., an agreement was executed by the parties, Exhibit 1, which settled their property rights and all matters pertaining to the support of the wife and the custody and support of the children. The defendant continued to live and practice medicine in Washington, D.C. for a year after the agreement was executed. Thereafter, in July of 1950, the defendant removed to Nevada where he established his domicile, obtained a divorce from the plaintiff, remarried, and has continued to be actively engaged in the practice of medicine. The defendant has continuously resided in Nevada since that time.

In June of 1952 the defendant was attending a medical meeting at Hot Springs in Bath County, Virginia, at which time the plaintiff commenced an action in that county to reduce certain of the amounts due under the agreement to judgment. Personal service was had on the defendant, and the Circuit Court of Bath County rendered judgment against the defendant on February 23, 1955, for the sum prayed for in the plaintiff's "first claim" of her complaint herein.

Paragraph 4 of the agreement in question, Exhibit 1, [133] provided, inter alia, for the payment to the plaintiff by the defendant of certain amounts of money to be computed on the basis of the defendant's "net income" on an annual basis. Net income is defined in the agreement as " * * * gross income from all sources of his income, less his usual, ordinary and reasonable office expenses and income tax payments for that year."

Paragraph 6 of the agreement further provides that the defendant pay certain educational expenses of the children and, specifically, for the educational expenses of a daughter, Betsy Gene, "If the school attended by her should be the school named in the agreement * * * or other school approved by the husband."

Pretrial conference was had herein, the Court entering its pretrial order on June 21, 1957. Under the title of "Agreed Facts" the following appears in the order:

"The execution of the agreement (Ex. 1) attached

to the complaint, and the entry of the Virginia judgment is admitted. It is also admitted that certain payments have been made by the defendant to the plaintiff under the terms of the agreement, namely, \$1,125.00. The parties agree on the costs incident to the Virginia judgment, the sum of \$99.20. It is also agreed that the defendant has paid nothing on plaintiff's judgment, and that under the terms of the agreement certain additional sums of money have accrued (subsequent to the period covered by the judgment) to plaintiff, the exact amount to be determined upon two facts, namely, the yearly net earnings of defendant plus the application of either the plaintiff's or [134] defendant's construction of the payment provisions of the contract (Ex. 1, Para. 4). It is agreed that somewhere along the line defendant is to receive credit for the sum of \$1,125.00."

The pretrial order, under the title "Disputed Matters," continues as follows:

"The present controversy centers around the manner of computation of the moneys due from defendant to plaintiff, and that in turn depends upon the construction of the terms of the agreement of July 13, 1949, (Ex. 1)." (Note: The writer has inserted the matters in brackets wherever such appear in the foregoing quotes from the pretrial order).

Now to the respective contentions of the parties. As to plaintiff's first claim based on the Virginia

judgment the defendant admits the same and offers no defense. His time for appeal in Virginia being long since past the matters therein passed upon are res adjudicata and binding on this Court. Defendant admits that he has paid nothing in satisfaction of the Virginia judgment. We find for plaintiff on her first claim.

Plaintiff's second claim covers (1) the amounts claimed due under the provisions of Paragraph 4 of the agreement, Ex. 1; and (2) reimbursement for sums of money totalling \$1,106.05 advanced by her for Betsy Gene's education, for which she claims reimbursement under paragraph 4 of the agreement.

We can dispose of the educational expense item provided for in paragraph 4 by merely observing that the plaintiff offered no proof to sustain her claim of reimbursement in [135] the sum of \$1,106.-05, so as to this item we find for the defendant.

Having disposed of the judgment, and education, claims we now turn to the real problem in the case, plaintiff's claim for \$27,600.00 under paragraph 4 of the agreement arising subsequent to the period covered by the Virginia judgment. It is conceded by the defendant that there are certain moneys due from him to the plaintiff since the date of those payments merged in the Virginia judgment, but he denies that he owes the amount claimed by the plaintiff. This difference of opinion between the parties is due to the different interpretations placed by the parties on the expression "net income" ap-

pearing in paragraph 4, and which is therein defined as "gross income from all sources of his income, less his usual, ordinary and reasonable office expenses and income payments for that year." Accepting the construction of the Virginia Court we hold that the payments due for any one year are determined by the "net" income of the preceding year.

Which computation to accept for the purpose of determining the moneys now due from the defendant to the plaintiff becomes now the problem of the Court. It is one of interpretation of paragraph 4 of the agreement. What did the parties intend at the time of the execution of the agreement? Did the agreement as written express the intention of the parties? We think it is clear as to what the parties intended, and further, that the wording of paragraph 4 faithfully recites such intention.

It appears from the testimony that during his several years of practice in Washington, D. C., while married to plaintiff, the procedure was to deduct from the gross joint earnings of the partnership medical practice such items as [136] are shown on Ex. 5, after which the remaining "net" was divided between the medical partners on an agreed percentage. Plaintiff contends that this same procedure should now be followed in arriving at the "net" of defendant's Nevada practice. Plaintiff contends that defendant's "net" is to be determined on the basis of the Washington practice as shown in Ex. 5. There is no dispute between the parties as

to the basic figures used in the computations set forth in Exhibits 4 and 5.

Ex. 4, prepared on the defendant's theory of arriving at the net of his Nevada practice, for the purposes of computing payments due the plaintiff under the provisions of paragraph 4 of the agreement, is as follows:

1952	1953	1954	1955
\$9,127.72	\$14,338.51	\$16,022.32	\$16,986.09

Using the same basic figures but eliminating such items as dues and memberships, entertainment, medical journals, insurance, interest, depreciation, and automobile expense, which were not deducted from the gross of the partnership practice in Washington, D. C., thus applying the Washington formula to the Nevada practice we come up with the "net" as shown in Ex. 5, namely:

1952	1953	1954	1955
\$13,105.59	\$18,234.23	\$21,685.30	\$23,845.92

We are of the opinion that plaintiff is correct in her assertion that the formula used in Ex. 5 is to be applied in determining the defendant's "net" annual income for the purpose of computing the amounts due her under paragraph 4 of the agreement. We therefore reject the formula proposed by defendant as used in arriving at the "net" annual income as shown in Ex. 4. We arrive at this conclusion on the theory that the parties entered into the agreement using [137] the Washington practice and procedure as the "yardstick." Indeed, it does

not appear that defendant contested the application of such "yardstick" in the Virginia suit, but if he did it was disregarded by the Court. Regardless of the partnership practice of deducting only certain limited items it would appear with some logic that in the Virginia action defendant could have advanced the theory that he had certain other deductible items of expense over and above those used in the partnership practice, namely the type of deductions which he now seeks to assert in the present action. We feel that our conclusion in this respect is buttressed by the manner in which the term "net income" was anchored into the agreement, it being there defined as "gross income from all sources of his income, less his usual, ordinary and reasonable office expenses and income payments for that year." (Underscoring ours.)

Defendant asserts that under the law of the State of Nevada, (N.R.S. 123.220) one-half of his earnings and income vested in his present wife and therefore only one-half of his earnings, medical and otherwise, should be used as the base for computing his net worth. Without going into detailed discussion on this point, and we concede that there can be much academic argument, we reject defendant's contention on this score. By way of illustrating our thinking we cite *Alexander v. Alexander*, 158 F2 492, and *Hutchinson v. Hutchinson*, 119 P2 214. It is obvious that at the time of the execution of the separation agreement the parties did not have in contemplation the vagaries of the law of forty-eight states, nor will this Court write them into the

agreement even though the argument is made by defendant's counsel that the sacred provisions of the Nevada community property law should be upheld. It may [138] be here said that the Court is concerned only with a determination of the rights of the parties based upon the Virginia judgment and the property agreement. At this point we do not think community property law enters into the picture. What might be the effect of raising that issue after judgment, and at such time as the plaintiff might attempt to satisfy her judgment, is a problem for another day.

In conclusion it is the opinion of the Court that the plaintiff have judgment as prayed for, save and except as to the \$1,106.05 item she seeks to recover under paragraph 4 of the agreement by reason of expense of education of Betsy Gene, which is denied for the reason hereinabove recited, namely, lack of proof.

The defendant is to receive credit on that part of the judgment entered on plaintiff's "second claim" in the amount of \$1,125.00, said payments having been made in the years 1954 and 1955 as indicated in defendant's answer by way of "separate answer and affirmative defense."

Counsel for plaintiff are directed to prepare, serve on opposing counsel, and lodge with the Clerk of the Court within twenty (20) days from the date hereof, consistent with this opinion, their proposed findings of fact, conclusions of law and proposed form of judgment. Counsel are directed, in making

such findings, conclusions and judgment to schedule in detail all computations of amounts and to clearly set forth the formulae used. Within ten (10) days thereafter counsel for defendant will serve on opposing counsel, and lodge with the Clerk of the Court such objections to said findings, conclusions and judgment as they may deem proper. [139]

Plaintiff is awarded her costs herein incurred.

Dated at Carson City, Nevada, this 30th day of December, 1957.

/s/ JOHN R. ROSS,
United States District Judge.

[Endorsed]: Filed December 30, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

The Court finds from the evidence as follows:

1. The plaintiff is a citizen of the District of Columbia and the defendant is a citizen of the State of Nevada, and the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

2. Plaintiff and defendant were formerly husband and wife, residing in Washington, District of Columbia. Unfortunate differences resulted in their

separation, and on July 13, 1949, in Washington, District of Columbia, they entered into a written agreement which settled their property rights and all matters pertaining to the support of the plaintiff and the custody and support of the minor children of the plaintiff and defendant. The defendant continued to live and practiced medicine in Washington, District of Columbia, for a year after the agreement was executed. Thereafter, in July, 1950, the defendant removed to Nevada, where he established his domicile, obtained a divorce from the plaintiff, remarried and has continued to reside and practice medicine in Nevada since that time.

3. In June of 1952, the defendant was in Hot Springs, Bath County, State of Virginia, and at that time and place the plaintiff commenced an action to reduce certain of the amounts due under the agreement to a judgment. Personal service was had on the defendant, and the Circuit Court of Bath County, State of Virginia, rendered judgment against the defendant on February 23, 1955, for the sum of Ten Thousand Three Hundred Fifty-Seven Dollars Thirty-Four Cents (\$10,357.34) plus interest on specified amounts from specified dates and costs amounting to Ninety-Nine Dollars Twenty Cents [141] (\$99.20). The said judgment with interest thereon at the rate of six percent (6%) per annum as provided by the laws of Virginia, computed to February 1, 1958, together with the costs in the amount of Ninety-Nine Dollars Twenty Cents (\$99.20), amounts to Fourteen Thousand Four Hundred Sixty-Six Dollars Thirty-Four Cents

(\$14,466.34) at this time. The defendant admits the said judgment, offers no defense thereto, and admits that he has paid nothing in satisfaction thereof.

4. The plaintiff offered no proof to sustain her claim of reimbursement for the sum of Eleven Hundred Six Dollars Five Cents (\$1,106.05) advanced by her for Betsy Gene Greear's education and support.

5. The agreement of July 13, 1949, provides that the payments due from the defendant to the plaintiff for any one year are to be determined by the "net" income of the preceding year. The plaintiff and defendant intended to express their intention, and did express their intention, in paragraph 4 of their said agreement concerning the matter of determining the amounts of money to be paid by the defendant to the plaintiff.

6. During the defendant's years of practice in Washington, District of Columbia, and while he was married to the plaintiff, the procedure was to deduct from the gross joint earnings of the partnership medical practice in which he and others were engaged, such items as are shown in Exhibit 5, after which the remaining "net" was divided among the medical partners on an agreed percentage basis. There is no dispute between the plaintiff and defendant as to the basic figures used in the computations set forth in Exhibits 4 and 5. Using the basic figures, but eliminating such items as dues and memberships, entertainment, medical journals, insurance, interest, depreciation, and automobile ex-

pense, which were not deducted from the gross receipts of the partnership practice in Washington, District of Columbia, thus applying the Washington formula to the Nevada practice, the defendant's "net" income as shown in Exhibit 5, has been as follows:

1952	1953	1954	1955
\$13,105.59	\$18,234.23	\$21,685.30	\$23,845.92

The parties entered into the agreement of July 13, 1949, using the Washington practice and procedure as the "yardstick." The term "net income" was anchored into the agreement, it being there defined as "gross income from all sources of his income, less his usual, ordinary and reasonable office expenses and income payments for that year."

7. At the time of the execution of the agreement of July 13, 1949, the plaintiff and defendant did not have in contemplation the vagaries of the law of forty-eight (48) states.

8. The plaintiff has proved her claims as set forth in her complaint filed herein, save and except as to the item of Eleven Hundred Six Dollars Five Cents (\$1,106.05) which she seeks to recover under paragraph 6 of the agreement by reason of the expense of the education of Betsy Gene Greear, the minor daughter of the plaintiff and defendant, as to which the plaintiff offered no proof.

9. The defendant offered no proof that his income fell below Seventeen Thousand Five Hundred Dollars (\$17,500.00) in the calendar year 1951, and

offered no proof that he paid anything on account of the Six Hundred Dollars (\$600.00) per month that accrued and became payable from him to the plaintiff during the seven (7) months, June to December, 1952. Accordingly, the sum of Four Thousand Two Hundred Dollars (\$4,200.00) is due and payable for that period.

10. The defendant owes the plaintiff Four Hundred Forty-Nine Dollars Forty Cents (\$449.40) per month for the twelve-month period January to December, 1953, or a total of Five Thousand Three Hundred Ninety-Two Dollars Eighty Cents (\$5,392.80), he having paid nothing to the plaintiff on account of the amounts that accrued and became payable during that calendar year.

11. The defendant owes the plaintiff Six Hundred Dollars (\$600.00) per month for the twelve-month period January to December, 1954, and has paid eight (8) payments of Seventy-Five Dollars (\$75.00) each or a total of Six Hundred Dollars (\$600.00) on account thereof, leaving an unpaid balance of Sixty-Six Hundred Dollars (\$6,600.00) for the calendar year 1954.

12. The defendant owes the plaintiff Six Hundred Dollars (\$600.00) per month for the twelve-month period January to December, 1955, and has paid [143] the plaintiff five (5) payments of Seventy-Five Dollars (\$75.00) each, and one (1) payment of One Hundred Fifty Dollars (\$150.00) on account thereof, leaving an unpaid balance of

Six Thousand Six Hundred Seventy-Five Dollars (\$6,675.00) due and owing for the calendar year 1955.

13. The defendant owes the plaintiff Six Hundred Dollars (\$600.00) per month for the four-month period January to April, 1956, or a total of Two Thousand Four Hundred Dollars (\$2,400.00) and has not made any payment to the plaintiff on account thereof.

14. The defendant owes the plaintiff Fourteen Thousand Four Hundred Sixty-Six Dollars Thirty-Four Cents (\$14,466.34) on account of the Virginia judgment, including interest computed to February 1, 1958, at the rate of six percent (6%) per annum and court costs in the Virginia court in the amount of Ninety-Nine Dollars Twenty Cents (\$99.20).

Conclusions of Law

From the foregoing findings of fact, the Court concludes as follows:

1. This Court has jurisdiction of the parties and subject matter of this action.

2. The payments due from the defendant to the plaintiff for any one year are determinable by the "net" income of the preceding year.

3. The defendant's "net" income should be determined on the basis of the Washington practice as shown in Exhibit 5, and the formula proposed by the defendant as shown in Exhibit 4 should be rejected.

4. the Nevada community property law does not enter into the case at this stage of the case.

5. The plaintiff is entitled to judgment against the defendant in the total sum of Thirty-Nine Thousand Seven Hundred Thirty-Four Dollars Fourteen Cents (\$39,734.14) with interest at the rate of six percent (6%) per annum on each of the amounts included in that total amount from their respective due dates, and her costs herein incurred.

Entered at Carson City, Nevada, this 28th day of January, 1958.

/s/ JOHN R. ROSS,

United States District Judge.

Acknowledgment of Service Attached. [145]

[Endorsed]: Filed January 28, 1958.

In the United States District Court
for the District of Nevada

Civil Action No. 1261

MARY SCHAAFF GREEAR, Plaintiff,

vs.

JAMES N. GREEAR, Defendant.

JUDGMENT

This action came on to be heard, and thereupon, upon consideration thereof, and the findings of fact and conclusions of law entered herein this day, it is,

by the Court, this 28th day of January, 1958, adjudged as follows:

That the plaintiff have judgment against and recover of and from the defendant the sum of Thirty-Nine Thousand Seven Hundred Thirty-Four Dollars Fourteen Cents (\$39,734.14) with interest at the rate of six percent (6%) per annum on Fourteen Thousand Four Hundred Sixty-Six Dollars Thirty-Three Cents (\$14,466.33) from the date of this judgment until paid, on Four Thousand Two Hundred Dollars (\$4,200.00) from September 15, 1952, until paid, on Five Thousand Three Hundred Ninety-Two Dollars Eighty Cents (\$5,392.80) from July 1, 1953, until paid, on Six Thousand Six Hundred Dollars (\$6,600.00) from July 1, 1954, until paid, on Six Thousand Six Hundred Seventy-Five Dollars (\$6,675.00) from July 1, 1955, until paid, and on Twenty-Four Hundred Dollars (\$2,400.00) from March 1, 1956, until paid, together with her costs herein incurred, and the plaintiff shall have execution for the said principal amount of this judgment, interest thereon as aforesaid, and costs of this action.

/s/ JOHN R. ROSS,

United States District Judge.

Acknowledgment of Service Attached. [147]

[Endorsed]: Filed January 28, 1958.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL AND MOTION
TO AMEND FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Defendant hereby moves the Court for a new trial for the reason that there are errors of fact and of law in the Findings of Fact and Conclusions of Law and that the Judgment entered January 29, 1958, is erroneous.

Defendant also moves the Court to amend the Findings of Fact and Conclusions of Law in the following respects:

1. Amend Finding of Fact No. 6 so that it will include as items of deduction to determine net income dues and memberships, entertainment, medical journals, insurance, interest, depreciation and automobile expenses.

2. Amend Findings of Fact No. 7 because it is indefinite and erroneous in fact and in law.

3. Amend Finding of Fact No. 8 by striking therefrom the following, "The plaintiff has proven her claims as set forth in her complaint filed herein," for the reason that the same is erroneous in fact and in law.

4. Amend all the calculations of amounts owing by defendant to plaintiff for the years 1953, 1954, and 1955 for the [149] reason that they are based upon alleged amounts of income received by defendant which were in fact not received by him and the

Court ignored the application of the Community Property Law of the State of Nevada in arriving at those amounts of alleged income.

5. Striking completely Conclusion of Law No. 3.

6. Striking completely Conclusion of Law No. 4.

7. Amend Conclusion of Law No. 5 by striking the amount therein stated and inserting an amount determinable by the application of the Community Property Law of the State of Nevada and by the inclusion as deductible items the expenses referred to in the foregoing objection to Finding of Fact No. 6.

February 3, 1958.

VARGAS, DILLON & BARTLETT,
/s/ By ALEX. A. GARROWAY,
Attorneys for Defendant. [150]

Affidavit of Service by Mail Attached. [151]

[Endorsed]: Filed February 4, 1958.

In the United States District Court
for the District of Nevada

No. 1261

MARY SCHAAFF GREEAR, Plaintiff,

vs.

JAMES N. GREEAR, Defendant.

ORDER DENYING MOTION TO AMEND
FINDINGS OF FACT AND CONCLU-
SIONS OF LAW, AND MOTION FOR
NEW TRIAL

The defendant's motion to amend findings of fact and conclusions of law, and motion for a new trial, came on the 12th day of March, 1958, for hearing and argument, James W. Johnson, Jr., appearing for the plaintiff, and Alex A. Garroway appearing for the defendant; and the motions being argued and submitted to the Court for ruling; now, therefore, and good cause appearing, it is

Ordered, that the defendant's motion to amend findings of fact and conclusions of law be and the same is hereby denied; and it is

Further Ordered, that the defendant's motion for a new trial be and the same is hereby denied.

Dated at Carson City, Nevada, this 27th day of March, 1958.

/s/ JOHN R. ROSS,

United States District Judge.

[Endorsed]: Filed March 27, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

James N. Greear, Jr., defendant, hereby appeals to the Court of Appeals of the Ninth Circuit from the judgment entered in this case March 27, 1958.

Dated: April 21, 1958.

VARGAS, DILLON & BARTLETT,
/s/ ALEX A. GARROWAY,

Attorneys for Defendant. [154]

Affidavit of Service by Mail Attached. [155]

[Endorsed]: Filed April 22, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED ON BY APPELLANT

1. The ownership of personal property is determined by the law of the domicile of the owner.

2. Under the law of the State of Nevada, the earning power of a husband is owned by the community of husband and wife domiciled therein, and the wife is the immediate owner at its acquisition of one-half of the product of the husband's earning power; the husband owns only the other half. The community has the nature of a partnership.

3. The law of Nevada above stated must be applied first to determine appellant's gross income from all sources. Thereafter, the calculation can be

made as to the payments owing from appellant to appellee under agreement Exhibit 1.

4. The determination of "usual ordinary and reasonable office expenses" of appellant should include dues and memberships, entertainment, medical journals, insurance, interest, depreciation, and automobile expense. [159]

Contents of Record

The record on appeal shall comprise the following:

1. Complaint and summons.
2. Answer.
3. Pre-trial order.
4. Transcript of testimony.
5. Exhibit 1 (agreement dated July 13, 1949).
6. Exhibit 4 (summary of income, with letter of accountant dated February 27, 1957).
7. Exhibit 5 (summary of income, with letter of accountant dated March 3, 1957).
8. Decision filed December 30, 1957.
9. Findings of Fact and Conclusions of Law.
10. Judgment entered January 28, 1958.
11. Motion to Amend Findings of Fact and Conclusions of Law and Motion for New Trial.
12. Order denying motions to amend and for new trial.

VARGAS, DILLON & BARTLETT,
/s/ ALEX. A. GARROWAY,

Attorneys for Appellant. [160]

Affidavit of Service by Mail Attached. [161]

[Endorsed]: Filed May 16, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Nevada—ss.

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby certify that the accompanying documents, listed in the attached index, are the originals filed in this court, or true and correct copies of docket entries and court minutes of this court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 18th day of June, 1958.

[Seal]

OLIVER F. PRATT,
Clerk,

/s/ By J. P. TODRIN,

Chief Deputy Clerk. [158]

In the United States District Court,
for the District of Nevada

No. 1261

MARY SCHAAF GREEAR, Plaintiff,

vs.

JAMES N. GREEAR, JR., Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: Hon. John R. Ross, Judge.

Carson City, Nevada

March 5, 1957

Be It Remembered, That the above-entitled matter came on for trial before the Court, sitting without a jury, on Tuesday, the 5th of March, 1957, at Carson City, Nevada.

Appearances: James W. Johnson, Arthur Hilland, Attorneys for Plaintiff. John C. Bartlett, Alex Garroway, Attorneys for Defendant.

The following proceedings were had:

The Court: Miss Reporter, let your records show that this is the time set for trial before the Court and without a jury, in the matter of Greear vs. Greear, No. 1261.

As the Court recalls from previous discussion and the pre-trial order in this matter, the matters to be presented are rather simple, at least, the order covered is rather circumspect. The problem seems to be the manner of the computation of the [48] earnings of the defendant, in relation to the agreement of July 15, 1949. Reversing it, what is the construc-

tion of that agreement as to the net earnings of the defendant subsequent to the entry of the judgment.

If you have any discussion for the moment, prior to going into the merits of the matter, to bring this matter more to a focus, to save our time, I will be very glad to hear from either or all of counsel. As I understand, there are to be no witnesses presented.

Mr. Johnson: I do not know as that is necessarily true, your Honor. Whether or not there are to be any witnesses presented, I really do not know.

The Court: I just assumed that at the time of the pretrial, but, of course, you have latitude in that respect, but it would appear to me the matters the Court would be interested in would be basically some information concerning the earnings of the defendant and any subsequent agreements or decree of the Court that might have a bearing on it.

Mr. Garroway: One of the items claimed is \$1106, which is based on the 6th paragraph in the agreement and has to do with the expenses of education of one of the daughters of the parties, and that may be the point where we will need some testimony. Dr. Greear is here and I am wondering if maybe that point might be taken up first, so if we need his testimony it can be obtained and he may be freed to go back to his office or [49] any hospital work.

The Court: Of course you can present as many witnesses as you see fit on any of the issues involved. This suggestion that Dr. Greear be permitted to testify is properly made.

Mr. Johnson: May it please the Court, I have

with me the original agreement over which this matter has been brought to trial. I should like, without objection, to introduce that in evidence. This is the original signed agreement in Washington. I also have exemplified copy of the Virginia judgment and I also have exemplified copy of the pleadings in the State of Virginia, which I should like to offer in evidence, which will be, perhaps, the basis of some of our argument even on the point which Mr. Garroway has just referred to.

Mr. Garroway: No objection.

Mr. Johnson: I ask that the agreement be marked plaintiff's Exhibit 1.

The Court: The agreement of the parties, dated July 13, 1949, will be admitted in evidence as plaintiff's Exhibit 1.

[Note: Exhibit 1—"Agreement" is the same as Exhibit A attached to Complaint, set out at pages 5-20 of this printed record.]

Mr. Johnson: I would like, without objection—I have counsel—I would like to request the admission of exemplified copy of the judgment in the Virginia court in the case of Mary Schaaf Greear vs. James N. Greear, as plaintiff's Exhibit.

The Court: The offer will be received in evidence as plaintiff's Exhibit 2. [50]

Mr. Johnson: I would like, without objection to admit as plaintiff's Exhibit No. 3, Motion for Judgment, Itemized Statement and two Opinions of the Court in the State of Virginia, relative to this matter. The dates of the Opinions, the first one October 8, 1954, and January 17, 1955.

The Court: The offer will be received in evidence as plaintiff's Exhibit 3.

Mr. Bartlett: Your Honor, we do not have any copies of these particular documents. May we have photo copies made, if it is possible for the clerk to have photo copies made?

Mr. Johnson: I am sorry, your Honor, I only have one exemplified copy. I probably should have had some made, but I just didn't.

The Court: Perhaps it would be more convenient to have the clerk have the copies made and you can do that at the expense of yourself.

Mr. Bartlett: Yes sir.

Mr. Johnson: May it please the Court, I am wondering if counsel would stipulate that the defendant became a citizen of Nevada and became divorced from the plaintiff in this action in 1950 and remarried in 1951?

Mr. Garroway: That is correct.

The Court: Will you state that again, please?

Mr. Johnson: That the defendant, James N. Greear, came here for divorce to the State of Nevada in 1950 and he remarried [51] in 1951.

The Court: That statement is stipulated to as being qualified, counsel?

Mr. Garroway: That is correct.

Mr. Johnson: That is all we have to offer, your Honor.

The Court: That is the plaintiff's case?

Mr. Johnson: That is the plaintiff's case, your Honor.

The Court: The record will show that the plaintiff, having introduced the exhibits designated 1, 2, and 3, and the stipulation of counsel, rests its case.

Mr. Garroway: May we have the indulgence of the Court, if your Honor please?

The Court: Yes, you may.

Mr. Garroway: We would like to have about ten minutes, may it please the Court. May we have that?

The Court: Yes. The court will be in recess then until 10:40 A.M.

10:40 A.M.

The Court: You may proceed for the defendant, gentlemen.

Mr. Garroway: If the Court please, the defendant rests.

The Court: The record will show that the defendant rests without offer of proof. Do you desire to make any comment or argument to the Court?

Mr. Johnson: Just a few comments, if your Honor please. [52] If your Honor will notice, Paragraph 4 of the agreement is the one in which we are basically interested. Paragraph 4 provides for the payment to the plaintiff by the defendant the sum of five hundred or six hundred dollars per month. It then goes on and states that, however, if the defendant's income drops below a certain amount, that these amounts may be changed. However, the original agreement, the agreement which is definite, the one which the defendant is obligated to pay, is the five or six hundred dollars per month. The five hundred dollars per month, I think, was so long as

the defendant remained married to his first wife, or so long as she was not obligated to pay income tax. Upon divorce, I believe the law is that the wife becomes obligated to pay tax on those amounts paid to her by the husband, which is six hundred dollars per month.

The Court: Now, counsel, the Court has spent some little time in looking over the agreement and Paragraph 4, at first blush, is just a little bit confusing. The Court has summarized the paragraph in this manner—I am going to read it:

“The husband promises and agrees to pay to the wife for her own support and maintenance the sum of Five Hundred (\$500) Dollars per month on the fifth day of each and every month commencing as of the fifth day of June, 1949, and continuing during their joint lives as long as she remains unmarried to another, but the obligation of the husband to make such payments shall [53] terminate as of the date of the wife’s death or marriage to another, and shall also terminate upon the husband’s death, without any liability on the part of his estate or personal representative, to make such payment after his death. Whenever the wife becomes obligated to pay an income tax thereon and the husband becomes entitled to an income tax deduction therefor, the said payment of Five Hundred (\$500) Dollars per month shall be increased to Six Hundred (\$600) Dollars per month and shall continue at the rate of Six Hundred (\$600) Dollars during any period that the wife is required to pay an income tax

thereon and the husband is entitled to an income tax deduction therefor. However, if and when the husband's annual 'net income' (meaning by that phrase his gross income from all sources of his income, less his usual, ordinary and reasonable office expenses and income tax payments by him for that year) is less than Seventeen Thousand Five Hundred (\$17,500) Dollars in any calendar year, the monthly payments to the wife for the succeeding calendar year shall be that proportion of Five Hundred (\$500) Dollars or Six Hundred (\$600) Dollars (whichever amount is then applicable) that Seventeen Thousand Five Hundred (\$17,500) Dollars bears to the husband's annual 'net income' during said [54] immediately preceding calendar year in which his 'net income' is less than Seventeen Thousand Five Hundred (\$17,500) Dollars, but the minimum payment shall be Three Hundred (\$300) Dollars per month as long as the husband's annual 'net income' equals or exceeds Seven Thousand Two Hundred (\$7,200) Dollars per calendar year, and whenever the husband's annual 'net income' equals or exceeds Seventeen Thousand Five Hundred (\$17,500) Dollars in any calendar year, the monthly payments to the wife for that year and each and every succeeding year in which the husband's annual 'net income' equals or exceeds Seventeen Thousand Five Hundred (\$17,500) Dollars shall be Five Hundred (\$500) Dollars or Six Hundred (\$600) Dollars per month (whichever amount is then applicable according to the above provisions in relation to income taxes thereon) on the fifth day of each and

every month commencing as of the fifth day of January of each of the years involved. If by reason of ill health, or any other cause, the husband's annual 'net income' should be less than Seven Thousand Two Hundred (\$7,200) Dollars per year, the rate of monthly payments by the husband to the wife shall be one-half of his annual 'net income', except that if that event occurs at any time during the time the husband is obligated for [55] the support, maintenance and education of their two minor children, or either of them, as hereinafter provided in paragraphs 5 and 6 of this agreement, the payments *be* the husband to the wife shall be reduced to one-third of his annual 'net income' during the period of time that he is so obligated for the support, maintenance and education of their said children or either of them. Whenever the husband's annual 'net income' is less than Seventeen Thousand Five Hundred (\$17,500) Dollars in any calendar year or less than Seven Thousand Two Hundred (\$7,200) Dollars in any calendar year, the husband shall furnish the wife, her agent or attorney, an itemized statement of his annual 'net income' and shall permit the wife, her agent or attorney, to make a detailed examination and audit of his books and record and income tax returns for the calendar years involved for the purpose of determining the accuracy of the itemized statement furnished by the husband to the wife, her agent or attorney. The wife agrees to sign a joint income tax return with the husband, at his request, until such time as she is required to make a separate

return and pay a separate income tax on the money paid by the husband to her.”

It appears that the first sum mentioned as net income is Seventeen Thousand Five Hundred Dollars, and the first provision is: [56] “However, if and when the husband’s annual ‘net income’ * * * is less than Seventeen Thousand Five Hundred (\$17,500) Dollars in any calendar year, the monthly payments to the wife for the succeeding calendar year shall be that proportion of Five Hundred (\$500) Dollars or Six Hundred (\$600) Dollars (whichever amount is then applicable) that Seventeen Thousand Five Hundred (\$17,500) Dollars bears to the husband’s annual ‘net income’ during said immediately preceding calendar year in which his ‘net income’ is less than Seventeen Thousand Five Hundred (\$17,500) Dollars * * *”, and this apparently is the basis which you refer to, that so long as the defendant’s net income is \$17,500 or better, the wife is to receive \$500 per month, which amount is to be increased to \$600 per month, in the event the wife is required to pay income tax and the husband is given credit for the amount that he pays to the wife. There are two conditions that must occur before it increases to \$600.

The next income bracket is \$7200 to \$17,499; in other words, just below \$17,500. In the event the husband’s, or defendant’s net income falls within that range, then the payment is to be made on a pro rata basis. If the total income of the defendant is less than \$7200, the plaintiff is to receive one-half of that net income, provided that in the event

the income is less than \$7200 and the defendant is required to make government contributions, the plaintiff then is to get one-third rather than one-half. Now this just about gives the formula. [57]

Mr. Johnson: Your Honor, one thing I would like to call to the Court's attention is the first part of Paragraph 4. The basic obligation at the time the contract was drafted was five hundred dollars or six hundred dollars to be paid. Then in the event, even at a later date, his income was to drop, my point is in determination of what his income is, the burden is upon the defendant to show it and not upon the plaintiff. Number one, basically the husband is to pay the wife between five hundred and six hundred dollars. Then, however, if his income is to fall below \$17,500, which are facts arbitrarily within his own knowledge, then in that event it is adjusted downward. I am speaking more or less on the point of burden of proof relative to that matter. Does your Honor follow my thinking in that matter?

The Court: Yes.

Mr. Johnson: Have you read the first portion of Paragraph 4, or would you like to have me read it to your Honor?

The Court: As a matter of fact, I have read it many times.

Mr. Johnson: I thought you probably had. Therefore, we feel that the way the contract is written, the way it reads, the intention of the parties when they executed it was that the defendant would be obligated in the sum of five hundred dollars until he divorced her, at which time, as a mat-

ter of law, she would become liable for income tax on whatever he paid her, and he [58] would be entitled to deduction. At that time he would pay her six hundred dollars. Subsequent to that, if his income were to drop, it would be within him to prove or to give the Court evidence of the fact that his income had dropped.

It also defines net income in the agreement, as to what it was intended at the time that the agreement was made. That is another point that I would like at this point to make. It was consummated in the District of Columbia. It was consummated prior to the defendant's ever coming to the State of Nevada, and it was consummated with the intent that his income from his medical practice would be subject to the definition of net earnings as set out in this contract. He had never at that time heard of community property, nor did he hear of it until some time later, and we have much authority to the effect that a contract must be performed in accordance with the law of the place where it is executed and in accordance with the intention of the parties at the time of the execution.

Therefore, that point, No. 1, it must be interpreted by this Court in accordance with the laws of the locus of the contract.

Number 2, this contract, and the interpretation of it, has already been considered by another court of competent jurisdiction in the State of Virginia. The time for appeal has passed; no appeal has been made. The defendant in this case has had his day in court and he has had the opportunity to raise all

[59] of the points relative to community property which he now raises, which by reading of what has been introduced in evidence, was not at that time raised. It would seem to me illegal that any person or any corporation could change the meaning or intent of a contract merely by moving his place of residence. I do not believe that is the theory of the law. I do not believe it is the spirit of the law.

The Court: The Court agrees with you to that extent.

Mr. Johnson: And I also believe that the Virginia judgment, as to interpreting the contract therefore relative to that, definitely is *res adjudicata*.

I might also state, if the Court will examine Exhibit 3 introduced by the plaintiff, the Court will find that the Virginia court assessed certain expenses of the education of Betsy Gene Greear at Duke University School of Nursing to the defendant, which have not been paid. The defendant now comes into court and claims he disapproved of that school. My theory on that is that that matter has been decided, it is *res adjudicata*, and he can not come in, in another court and raise a defense which is different, if it is. Now I do not know what his defense was there, but the Court found that Mrs. Greear, the first Mrs. Greear, was entitled to the expenses relative to that amount.

There is one other point I should like to raise. In the contract, the 1955 directive order No. 715, of the \$1106, your Honor, is an allowance that goes outright to the girl, whether or [60] not she goes

into school. The balance of the sum of four hundred dollars are payments for tuition and expenses, which we feel the defendant should pay. Now prior to this hearing she was attending the school to which he claims he objected and Mrs. Greear was awarded expenses relative to sending their daughter to that school. Now since November 1, 1950, with the exception of \$1125, that is approximately six years, the defendant has paid nothing.

Mr. Bartlett: Just a moment—as I understand now——

Mr. Johnson: That is in the pre-trial, it is stipulated, that the full amount paid the plaintiff to date has been \$1125; it is in the pre-trial order. It has already been decided. That is my understanding.

The Court: That is the Court's understanding. A certain amount of money has been paid.

Mr. Bartlett: That is correct, your Honor.

Mr. Johnson: Nothing more has been paid since November, 1950.

Mr. Bartlett: Counsel is testifying as to the school which the daughter attended, which she had no right to attend. That is what I am objecting to.

Mr. Johnson: If the Court please, there is evidence, if the Court will read plaintiff's Exhibit 3, relative to the school Betty Gene Greear attended at that time.

The Court: As to your statement that the burden is [61] on the defendant to carry to the plaintiff the information that his net earnings have fallen below the amount of \$17,500, I observe that Paragraph 4 has a provision relative to that, which

reads—I have a copy of the contract of 1949, which is attached to the complaint—this provision is on page 6 and it is the first full sentence at the top of that page:

“Whenever the husband’s annual net income is less than \$17,500 in any calendar year or less than \$7200 in any calendar year * * *”

I am unable to see that that last figure, \$7200, that would add anything to it. What it means, when the defendant’s income is less than \$17,500 he shall furnish to the wife the itemized statement of his annual net income and shall permit her to make an audit of the books of the defendant. Is that the condition you had in mind when you say it is the burden of the defendant to make knowledge of his changed financial status to the plaintiff?

Mr. Johnson: Yes that is, your Honor, I understand that to be so. Whether or not that has been submitted each year, frankly I do not know. If the Court please, I prepared a brief outline of the argument.

The Court: Do you wish to outline the argument?

Mr. Johnson: I believe I have in most instances, your Honor, with the exception of the one thing, definition relative [62] to income. The net income is defined as the husband’s income less ordinary and reasonable office expenses and income tax payments. There has been some argument as to what are usual, ordinary and reasonable office expenses.

The Virginia court, of course, has made a determination relative to that.

The Court: Do you wish to have published the deposition of James N. Greear and filed?

Mr. Johnson: Yes, your Honor, I would like to have it published.

The Court: If the deposition were to be received in the orderly manner, it should have been before the plaintiff rested, but one purpose of permitting it to be published in the plaintiff's case will be to permit the plaintiff's case to be reopened. It is the order of the Court that the deposition of James N. Greear, dated October 1, 1956, be, and it is hereby, published and filed.

Mr. Bartlett: May the record further show that the defendant, since the plaintiff's case in chief has been reopened, the defendant has the right to proceed.

The Court: That is proper and the record will show, as Mr. Bartlett has said, defendant is given the right to reopen his case in chief, and in the light of the deposition, we will proceed with anything you have to offer. [63]

Mr. Garroway: Do I correctly understand that the statements on admission made in defendant's trial memorandum are already then before the record? In other words, with respect to the net income for 1952, 1953, 1954 and 1955, the defendant filed memorandum setting forth amounts he deems to be net income for those years, subject, of course, to the Court's determination as to whether or not that is community property and community net income,

but it has been my understanding that such admission in the trial memorandum places it as an admission in the record. If that is not correct, then I want to offer it in evidence.

Mr. Johnson: If the Court please, I will object to those particular figures as to what constitutes net income at that time, under the definition as contained in the agreement.

Mr. Garroway: Well, now, if the Court please, at the pre-trial we discussed the possibility and probability of counsel for the plaintiff employing a certified public accountant and we then and there offered all the books and records of the defendant to that certified public accountant and Semenza & Kottinger of Reno have been, as I understand, employed by the plaintiff and they have had access to all books and records of Dr. Greear and they have submitted a report, a copy of which Mr. Johnson was kind enough to give us, and I have that report here and the figures which are now in our trial memorandum as admitted net income are the exact figures shown by Semenza & [64] Kottinger in that report, and I am speaking now with respect to Mr. Johnson's argument that the burden is upon us to show our net income is less than \$17,500. I don't agree, of course, with that conclusion. I feel there is a burden upon the plaintiff too, but if there is such a burden upon us, then that is evidence which I offer and I am taking the evidence from the report of the certified public accountant employed in this case by the plaintiff.

Mr. Johnson: If the Court please, it is true we

had that done and I have a copy for the Court, if the Court so desires. However, we do not feel, counsel for the plaintiff do not feel, that Mr. Semenza is qualified to construe the contract in this case and for the purposes of finding gross income and expenses, whether or not they were considered to be usual, ordinary and reasonable office expenses. As to income taxes, there is no argument, but there is some argument relative to the others. I am perfectly willing with counsel to stipulate—I don't have the original, only a copy.

Mr. Garroway: I have only my copy.

Mr. Johnson: I have two copies, but I do not have the original.

Mr. Garroway: If the Court please, it seems to me, from what Mr. Johnson has said, we will now get into the matter of the determination by the Court of all items of deduction which are claimed in arriving at the figures which we have admitted [65] to be the net income for the respective years. In other words, it has been my thought, and apparently incorrectly so, that plaintiff was employing a certified public accountant as one who was expert enough to know what items were properly deducted against gross income and therefore ascertain, for the benefit of this Court, what would be net income from the operation of defendant's professional business. If that is not now admitted by the plaintiff, we will present every item of deduction and counsel can object, but the Court would have to decide which items are or are not deductible, in order to arrive at net income under the terms of this agree-

ment. It had been my thought at the pre-trial that perhaps Semenza & Kottinger could come forward with a report which would be acceptable to both sides and we have accepted it and we call attention to the fact that the agreement itself provides for an acceptable certified accountant going to all the books and records of the defendant, and that is what we have afforded to the plaintiff and it is the plaintiff's certified public accountant who has made the report and given the figures and we now submit to the Court comprises the net income of that business.

Mr. Johnson: In my trial memorandum, if the Court please, I did state at the time of the trial this report would be given to the Court for whatever it was worth.

The Court: Of course, if counsel will stipulate the Court will have the report for what it is worth, [66] then we will admit it. As a matter of fact, the Court would have to necessarily allude to the deposition, because up until that time we had the matter pretty well tied up.

Mr. Garroway: I am sorry—I can't quite understand the last remark of the Court, that there is nothing before the Court in this respect. Is it true then that the admission in the trial brief we have filed has not been a matter of evidence? My thought on it was that the figures that are in that brief are an admission that is net income from the business.

The Court: I will say to the extent of the figures, it would be admission of at least that much, but I do not see where the Court is circumscribed

that it can't consider that it wasn't all the income.

Mr. Garroway: Then I assume, from the recent ruling of the Court, we would have permission to put Dr. Greear upon the stand and have him answer several questions with respect thereto.

The Court: If you wish to put on any proof, certainly the Court will be pleased to hear it. It is the Court's desire to have this matter for the record. I merely stated in the beginning what appeared to be the understanding at the pre-trial.

Mr. Bartlett: Do I understand counsel is offering the Semenza & Kottinger matter and report in evidence and asking if we have any objection? [67]

Mr. Johnson: If we do, we would offer to change figures of gross income, your Honor. There might be some argument relative to what constituted office expenses.

Mr. Bartlett: Do you desire to offer what you think may aid you and refrain from offering what you think is not going to aid you?

The Court: If it is admitted, it will go in for all purposes.

Mr. Bartlett: We will stipulate to the admission. These are prepared from the books of Semenza & Kottinger, at the request of the plaintiff. We are willing to stipulate that that entire report go into evidence.

Mr. Hilland: Your Honor please, what we can stipulate with respect to that report is this: that the figures in it are correct, both with respect to gross income and deductions. What we can not stipulate is that the accountants who made that report are

the judges of the meaning of net income as defined in this contract. In other words, if it is admitted with the understanding that your Honor will determine what are usual, ordinary and reasonable office expenses, within the meaning of the definition of net income in the contract, then we can stipulate to it. That would mean that what your Honor would have to do would be to find out from the testimony of Dr. Greear what constituted usual and ordinary office expenses at the time this contract was made in 1949, and then determine whether or not all [68] of these deductions he has claimed fall within those categories, namely, usual, ordinary and reasonable office expenses. Now actually he has claimed a lot of things in there for deductions which we think, under a correct interpretation of the contract, and particularly the definition of net income in the contract, they would not be allowable deductions. We have asked Mr. Semenza to restate his report on that basis, so that your Honor probably would not have to do the arithmetics. We have asked him to do that, but we certainly would have to take some testimony to determine what were usual and ordinary and reasonable expenses at the time of the contract, because a lot of these things are not in that category.

The Court: You would stipulate the correctness of the figures, as far as they go and are shown by the exhibit?

Mr. Hilland: Yes, your Honor.

The Court: Certainly the Court is going to have, as its evidence to determine the matters that it

must apply its reasoning on, a firm of accountants and I can say that the accountants' breakdown in one category or another is not binding on the Court. It is a piece of evidence that the Court will consider.

Mr. Hilland: With that understanding, we will stipulate.

Mr. Garroway: I would like, if possible, to know now [69] what categories are set forth in this report that plaintiff's counsel will admit are properly deducted and which categories they claim are not. Then I also want to know whether or not in this proposed new statement of Semenza & Kottinger, will this same list of categories be followed, or will there be a change?

Mr. Hilland: I call your Honor's attention to the wording of that definition of net income. The contract set that meaning by that phrase, "the usual, ordinary and necessary office expenses" and income tax payments made by the defendant for that year. Now under that definition, in this statement he has a heading of "Dues and Memberships", which we contend do not fall within the category of office expenses.

Mr. Garroway: Dues and Membership?

Mr. Hilland: Yes. Immediately after that is the heading of "Entertainment", which we contend does not fall within that definition. Next heading immediately after that is "Medical Meetings, Direct Expenses" under one, and second "Arbitrary Allocation." We contend that medical meetings are not within the definition of net income or expenses

allowable deductions, and at that point, your Honor, I am going to have, inasmuch as we have not reached a definite stipulation yet—I am going to have to renege. This expense on “Medical Meetings, Direct Expenses”, we do not accept those figures. “Arbitrarily Allocated”, we could not accept the figures opposite that heading. The next heading here we contend, the next items under allowable deductions, is [70] “Medical Journals” and “Professional Insurance,” “Interest,” “Auto Expense,” and “Depreciation.”

Mr. Garroway: Now am I to understand that the new figures or statement to be prepared by Mr. Semenza will follow the same categories?

Mr. Hilland: Yes sir. In other words, the new statement will omit the categories which I indicated.

Mr. Garroway: That new statement, then, will contain all the figures upon this statement, except such as apply to the categories which you are objecting to?

Mr. Hilland: That is right.

The Court: Wouldn't a little addition and subtraction make this statement work?

Mr. Hilland: Yes, your Honor, but there are a powerful lot of figures in there. Unless you like figures better than I do, you are not going to want to do that.

The Court: I know. As I understand this discussion which has been directed toward the statement, which I understand was made by Semenza & Kottinger, that both counsel for the plaintiff and

defendant are agreed, as I understand it, that the figures are proper, they are correct, and to that extent there is no objection to it being in evidence?

Mr. Hilland: With that one exception I stated, that I said to your Honor I would have to renege on, that is "Arbitrarily [71] Allocated," figures under heading of "Medical Expenses."

The Court: I hadn't completed my statement. Plaintiff's counsel say that the report should be taken for what it is worth. The plaintiff proposes to offer another statement, based on the same figures, but showing only, indicating, what are proper expenses. Now it would appear to me that both the present set of figures and the new set of figures which will be made, at best they are going to be on figures which you consider are true, and this present one shows the theory of office deductions which the defendant deems proper, and the next will show a set of figures that the plaintiff considers are proper.

Mr. Hilland: That is satisfactory.

Mr. Bartlett: My only thought was, I should think it might be helpful to the Court if the accountant who prepared this, and is after all the accountant for the plaintiff, were to testify as to expenses, whether or not the purchasing of medical journals, to which they object—

The Court: Now it is true he may testify to the breakdown and it may be of some assistance to the Court, but after all the Court can't help but take judicial notice of its experience over some thirty years of conducting an office, and certainly the

Court will be more influenced by that knowledge and experience [72] than it would be by any particular views of the accountant.

Mr. Bartlett: I might state also, in case this has not been verified for the record, that Mr. Johnson said he didn't know whether or not these forms, income tax returns, had been furnished to the plaintiff prior to this time, and they have been, they have been furnished with copies of all income tax returns for several years.

The Court: Let us not get away from these statements, gentlemen.

Mr. Garroway: If the Court please, we are just a little bit uncertain as to the procedure now. Would it be satisfactory to the Court—

The Court: The case will be reopened.

Mr. Garroway: Then would it be satisfactory to the Court to put Dr. Greear on now with respect to these items?

The Court: Yes.

Mr. Hilland: Do I understand correctly that Mr. Semenza's other statement will also be submitted, his restatement of this, or admitted when it is brought in?

The Court: That is the Court's understanding. Let the record show that, pursuant to stipulation, the case is reopened for the taking of testimony, that the statement of Semenza & Kottinger, made February 27, 1957, is received in evidence as plaintiff's Exhibit [73] 4, with the understanding that a further statement will be made by the same firm, based upon the same gross figures, but showing the

breakdown on the basis of plaintiff's theory of office expense deduction, and at such time as that is prepared, a copy served on counsel for the defendant and copy filed in Court, will be admitted in evidence as Plaintiff's Exhibit 5.

[See pages 128-136.]

Mr. Bartlett: Yes, your Honor. Now I assume on that subject we are not going to be confronted with the opinion statements of Semenza & Kottlinger. As I understand, they are simply going to break down to follow the theory advanced by the plaintiff.

The Court: That is my understanding.

Mr. Hilland: That is right. I think it should be understood all the way through to any extent their opinion may be reflected in the statement, it is to be disregarded by the Court.

The Court: Gentlemen, in keeping with the statement the Court has made, it does not propose that the opinions of Semenza & Kottlinger will be taken or considered by the Court.

Now do you desire to put on Dr. Greear? [74]

DR. JAMES N. GREEAR, JR.

being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Garroway): Dr. Greear, you are the defendant in this case? A. I am.

Q. Some time during the last six months or so have you furnished to Messrs. Semenza & Kottlinger all of your books and records in connection with

(Testimony of Dr. James N. Greear, Jr.)

the operation of your office and business as a medical doctor and eye specialist? A. I have.

Q. Did you make available to them all the books and records you have? A. Yes.

Q. Did they ask for anything they did not receive from you?

A. There were some things that I inadvertently—bank statements—that I inadvertently left out of the offer he first took, which were later, when he called my office, found and turned over to them.

Q. I show you what has been marked Plaintiff's Exhibit 4, and I call your attention to the item on the statement of figures, "Dues and Memberships." Will you explain generally those items that go to make up dues and memberships, as to the figures shown on this statement of Mr. Semenza's?

A. Dues and memberships applies to dues as to medical societies.

Q. What medical societies do you belong to, to which you pay [75] dues?

A. I belong to the American Medical Association, American Ophthalmology Society, American Academy of Ophthalmology and Otolaryngology, the Virginia Medical Society, the Medical Society of the District of Columbia, Society of Medical Consultants, World War II, the Nevada State Medical Association, Reno Surgical Society, San Francisco Ophthalmology Round Table, American College of Surgeons.

Q. That is what you can remember now?

(Testimony of Dr. James N. Greear, Jr.)

A. Pacific Coast Optology Society. Those are generally the ones I am actively engaged in.

Q. And are those the memberships that required you, in the years 1952 to 1955 inclusive, shown on Exhibit 4, to pay dues and membership dues that are shown on that statement?

A. That is correct.

Q. I call your attention to the next item on the statement, "Entertainment," which shows for the year 1955 only \$720 net expenditures. Will you explain what that is for, Doctor?

A. Well, doctors, as well as lawyers I am sure, can't advertise through papers or ordinary media of advertising, but they can entertain people who are patients of theirs, doctors who refer patients to them, and that sort of thing; simply a means of expressing your appreciation for the confidence that other doctors have placed in you, and that is one of the things that is considered, is accepted, by the Internal Revenue as an allowable [76] deduction in the operation of a practice of medicine.

Q. Doctor, what is your specialty?

A. I specialize in diseases of the eye.

Q. From what sources do you get your business?

A. Primarily you get your practice from referring physicians, a great percentage.

Q. Where is your office?

A. 100 West Center Street.

Q. Do you know how much square foot space you have there, that is, say something about the size of your office, your equipment.

(Testimony of Dr. James N. Greear, Jr.)

A. My office occupies three rooms. They are good size; actually five rooms, at the moment. They are all pretty good size. I might say they are probably 15 by 18, that is two of them, three of them 15 x 20; and expensive equipment, instruments that are used in the examination of eyes, and the cost of these things——

Q. With reference to the item of entertainment, will you tell us principally who are the recipients of that entertainment?

A. Primarily physicians.

Q. I call your attention now to the item on this statement, "Medical Journals," which has a sum expended each of those years of 1952 to 1955 inclusive. Will you tell us what journals were purchased?

A. I took the Journal of American Medical Association, the Journal of American Medicine, the American Journal of Ophthalmology, [77] books and periodicals, books that are being published continually, we purchase those.

Q. Do you consider all those necessary in your profession?

A. They certainly are.

Q. I call your attention also to the items under the heading of "Professional Insurance" for each of the years mentioned. Will you tell us what that expenditure was for?

A. That is for insurance for suit for damages that a patient might incur at your hands.

Q. And what is the purpose of that insurance?

A. The purpose of that insurance is simply to

(Testimony of Dr. James N. Greear, Jr.)

protect the physician who might be sued by some person.

Q. What does the insurer of that insurance policy agree to do for you?

A. He agrees to defend me in case of suit, malpractice, treatment patients receive at your hands.

Q. And will the insurance company pay any judgment that might be entered against you to save you from paying? A. That is right.

Q. I call your attention to the items under the heading of "Interest" on this statement and ask you what that was for?

A. "Interest"—when I established my practice in the State of Nevada I had to borrow considerable sum of money to equip my office and I discussed this with Mr. Semenza and explained to him a portion of that interest I felt was deductible because it [78] was money I borrowed to equip my office.

Q. Did you have a discussion with Mr. Semenza concerning the items which are appearing on this statement? A. Yes, I did.

Q. And from that discussion is it your thought, and from what you know of the figures, that the items of interest shown on this statement represent solely interest paid on obligations incurred in connection with equipment and the operation of your office?

Mr. Hilland: We object, your Honor, on the ground Mr. Semenza was not employed to enter into any understanding with Dr. Greear concerning

(Testimony of Dr. James N. Greear, Jr.)

what was properly allowable deduction, and that is something for your Honor to decide.

The Court: You may restate the question.

Q. Dr. Greear, you have said that you discussed with Mr. Semenza the various figures that are shown on this report of Mr. Semenza's. Because of that discussion, and because of your knowledge of your own books and figures, do you say that the items which are now shown on this statement, Exhibit 4, as having been expended for interest, cover solely interest on obligations incurred by you in connection with the purchase of equipment and the operation of your professional office?

A. I would assume that these figures represent the interest on money that was borrowed to equip my office when I first began practice in Nevada, and pursuant to the discussions that I had [79] with Mr. Semenza relative to it.

Mr. Hilland: We object to that and move to strike because he said that is his assumption.

The Court: The answer will be stricken. Your answer is not entirely responsive, Doctor. I do not wish to lead, but what I am interested in, are these figures based upon your own knowledge of the facts?

A. These figures are, yes.

Q. I call your attention now to the category of this statement, Exhibit 4, "Auto Expenses," and the various amounts shown for each of the years in question. Will you tell us what that represents?

A. That represents eighty per cent of the cost

(Testimony of Dr. James N. Greear, Jr.)

of operation of my automobile and twenty per cent for personal use of the car.

Q. Doctor Greear, how much of the entire use of your automobile do you attribute to your professional use? A. At least eighty per cent.

Q. And this figure, as you have said, is eighty per cent of the total upkeep and expense of the automobile? A. That is correct.

Q. I call your attention to the item of depreciation, showing certain figures for each of the years in question. Will you explain that to the Court please?

A. That is simply the normal depreciation on the automobile, which is allowable by the income tax, Internal Revenue, on income [80] tax returns, and it is a depreciation on my automobile that I use in my practice.

Q. Is there any depreciation on equipment in that figure?

A. Equipment of the automobile?

Q. No, equipment in your office?

A. I am sure there is. There is some equipment. Those are the only two items that could be included in depreciation.

Q. I call your attention now, Doctor, to the several items under the category, "Medical Meetings," entitled "Arbitrarily Allocated," and various amounts shown there for the years in question. Will you explain that please?

A. Yes. In connection with medical meetings, I

(Testimony of Dr. James N. Greear, Jr.)

have discussed this with the Internal Revenue people and they have——

Mr. Hilland: We object to that and move to strike that.

The Court: For the moment the Court will overrule the objection.

A. Simply I went to them and asked them what I might deduct from my income tax in regard to the expenses of medical meetings and they agreed that a certain figure would be allowable, and that is what this "Arbitrarily Allocated" is.

The Court: In short, you didn't have an itemized account of what your daily expense was?

A. That is right.

The Court: But so far as you could, you estimated and discussed whether or not that was a proper deduction [81] with the income tax people and these figures represent the amounts properly deducted?

A. That is correct.

The Court: The answer may stand.

Q. How long have you been engaged in your practice? A. Since 1923.

Q. Where did you first practice?

A. I first began actively in private practice in the District of Columbia.

Q. Did you practice there continuously until you came to Nevada?

A. Except during the period that I was in New York during World War II.

Q. Did you practice there alone or with others?

(Testimony of Dr. James N. Greear, Jr.)

A. I was engaged in practice with two other doctors, first one other physician and two and finally three of them at the time I left there.

Q. Did you have a partnership?

A. I had a partnership.

Q. When did you come to Nevada?

A. On the 5th of July, 1950.

Q. When did you commence to practice in Nevada?

A. I received my license to practice on the 7th of August and began to practice shortly after that.

Q. Have you practiced here continuously from then until now? A. Continuously. [82]

Q. Doctor, how many rooms did you have in your office in Washington in your partnership?

A. I have to think—we had eight.

Q. I now refer again to this statement of Semenza & Kottinger, Exhibit 4. I ask you if, in your practice in Washington, you had similar categories of expenditure? A. Yes sir.

Q. In your practice over the years, are you familiar with the operation of offices conducted by others in your profession? A. Yes sir.

Q. Are you familiar with those conducted in Washington, D. C.? A. Yes.

Q. Did you become at all familiar with any of them in Reno, Nevada? A. Yes sir.

Q. I ask you, Doctor, whether or not these items we have just been discussing in this report are normal and reasonable expenditures, as you know

(Testimony of Dr. James N. Greear, Jr.)

them, to have been incurred in offices of others engaged in your profession?

Mr. Hilland: Your Honor, we object to that on the ground it isn't a question of what others have done; it is a question of what is permissible under the language of Paragraph 4 of the contract of July 13, 1959. In other words, what constitutes office expenses within that term, not what somebody else does. [83]

The Court: Certainly the Court is interested in knowing whether they are reasonable.

Mr. Hilland: The question is not directed to the reasonableness now, your Honor, but the question is directed whether or not other offices, with which the Doctor has familiarity, makes deductions for similar expenses. That is the question. Undoubtedly other offices may have similar expenses, but the question is whether or not these expenses constitute office expenses.

The Court: Objection overruled. Read the question.

(Question read.)

A. The answer is yes and it is all the items that we normally have, the items that are commonly deductible and allowable on income tax returns as normal, usual and necessary office expenses.

The Court: The Court is not concerned with what usually is, Doctor. It is concerned only, are these all the type of usual expenses an office such as yours incur?

A. Yes.

(Testimony of Dr. James N. Greear, Jr.)

Q. Doctor Greear, would your answer be the same as of July 13, 1949, the date you entered into the agreement with Mary Schaaf Greear, that these are usual and ordinary office expenses and were such at the time you entered into that agreement?

A. They were. [84]

Q. Doctor, I refer you again to Exhibit 4 and call your attention to the items of net income as shown on the bottom of page 3 of that exhibit, showing figures of net income for the years 1952 to 1955 inclusive respectively. I ask you if those figures reflect the net income as shown by the books kept by you in the practice of medicine?

A. They do.

Q. Doctor, I call your attention again to Exhibit 4 and the item at the top of page 3, showing income, and I ask you whether or not you had any more income than the figures shown for those years, 1952 to 1955 inclusive?

A. No.

Q. That is your gross income for each of those years?

A. Each of those years.

Mr. Garroway: You may cross examine.

Cross Examination

Q. (By Mr. Hilland): Doctor Greear, when Plaintiff's Exhibit 1, which is the agreement of July 13, 1949, was entered into between you and the plaintiff, you were a member of a firm of medical doctors in the District of Columbia known as Drs. Burke, Greear and Downey, were you?

A. That is correct.

(Testimony of Dr. James N. Greear, Jr.)

Q. How many partners were there in that firm?

A. There were three partners.

Q. And they were you and Dr. Burke and Dr. Downey? [85]

A. That is right.

Q. How many doctors were there in the firm?

A. There were four.

Q. What was the name of the fourth one?

A. I forget.

Q. Dr. Haywood? A. That is right.

Q. How long had you been a member of that partnership? A. About twenty years.

Q. You began your association with Dr. Burke in 1923, I believe? A. That is correct.

Q. And then Dr. Downey and Dr. Haywood joined your firm some time after that?

A. That's right.

Q. The partnership paid the office expenses of the firm, did it not? A. No.

Mr. Garroway: I would just like to put on record this objection. The questions so far are relevant to the credibility of this witness as against his direct examination, but I would like it understood that admissibility of the evidence is for that purpose alone, to attack his credibility, rather than for the establishment of any condition which existed at that time. My general argument will be raised later, but I object in connection with other points involved in this case. [86]

Q. Dr. Greear, wasn't it the usual and customary

(Testimony of Dr. James N. Greear, Jr.)

practice in that firm for the partnership to pay the office expenses?

A. To pay the rent, light and heat and stationery, the secretaries.

Q. How long had that been the custom of that particular firm?

A. The custom of that firm since I was associated with them.

Q. And periodically the profits of the firm were divided, were they not, among the doctors?

A. The profits were divided periodically.

Q. How often did that occur?

A. Monthly.

Q. Each one of you had a drawing account, did you not? A. No.

Q. Didn't each one of you have a drawing account under the articles of partnership?

A. No.

Mr. Garroway: Objected to, your Honor, as not cross examination.

The Court: Well, it goes a little far, but before the Court ruled it had been answered and the answer was no.

Q. Dr. Greear, isn't it a fact that out of the professional fees that the partnership took in, it paid the office expenses and then periodically you divided up the profits of the firm?

A. On a percentage basis. [87]

Q. Yes, on a percentage basis, and didn't you do that quarterly or semi-annually?

A. Monthly.

(Testimony of Dr. James N. Greear, Jr.)

Q. And do you have with you a copy of the articles of partnership that you had with Drs. Burke and Downey? A. No.

Mr. Garroway: I move the answer be stricken for the purpose of objection.

The Court: The answer is stricken. Objection sustained.

Q. Now, Dr. Greear, you remember testifying in this case at Warm Springs, Virginia, on June 8, 1953, in the case entitled, Mary Schaaff Greear vs. James N. Greear, Jr., civil case No. 73, in the Circuit Court of Bath County, Virginia?

Mr. Garroway: I would like to know the purpose of this examination.

Mr. Hilland: I am going to offer it for impeachment.

Mr. Garroway: In what respect?

Mr. Hilland: In respect to the answer he just gave.

Mr. Garroway: What is the answer you want to impeach?

Mr. Hilland: Let me get at it this way then.

Q. Dr. Greear, when you entered into this agreement with Mrs. Greear on July 13, 1949, which is marked Plaintiff's Exhibit 1, you had been operating under a medical partnership with Dr. Burke since 1923, had you not? Isn't that correct? [88]

Mr. Garroway: I object to that on the ground of irrelevancy. It seems to me it is not attacking his credibility with respect to the items of deduction

(Testimony of Dr. James N. Greear, Jr.)

which we have testified now on direct examination in connection with Exhibit 4.

The Court: I can't see where this particular line of questioning is very material or relevant, or how it can assist the Court.

Mr. Hilland: Here is what I want to show, your Honor. I want to show what was usual and ordinary expenses at that time.

The Court: I think you are entitled to do that, as to what the understanding was at that time, and to that extent you may proceed.

Q. Will you answer the question, Dr. Greear?

The Court: Restate the question.

Q. You were in a medical partnership from the time you began to practice in 1923, or shortly thereafter, until you came to Reno in 1950, were you not?

A. I was. Not immediately. I was on a percentage basis.

Q. You had never practiced medicine alone prior to coming to Reno, had you?

Mr. Bartlett: Objected to as immaterial.

The Court: It may stand. Objection overruled.

A. I practiced medicine alone all my life, ever since I practiced medicine. I was associated with other men, but I did my own practice. [89]

Q. But you had a partnership?

A. We had an office and partnership, yes.

Q. On July 13, 1949 the term "Office Expenses" had a definite meaning in your practice of your profession, did it not?

(Testimony of Dr. James N. Greear, Jr.)

Mr. Bartlett: We object to that as calling for conclusion of the witness on a matter which is going to have to be decided by the Court.

The Court: Objection overruled.

A. May I have the question?

(Question read.)

A. It had the same meaning as it has——

Q. Just answer yes or no. It did, did it not?

Mr. Garroway: The witness can explain.

Mr. Hilland: Yes, but the question now doesn't call for his explanation.

The Court: Answer the question.

A. Yes.

Q. Now the partnership to which you refer paid the office expenses, did it not?

A. The partnership paid the office expenses; it did not pay all the expenses, however.

Q. I didn't ask you that, Doctor. They paid the office expenses, did they not, the partnership paid the office expenses, did it not?

A. They paid the basic, some of the office expenses, but not all that was connected with the practice of medicine.

Q. I didn't ask you that. I am asking, did it pay the office [90] expenses connected with that partnership practice?

The Court: Answer yes or no and then explain, Doctor.

A. I have answered. They paid certain of the expenses, they paid certain of the expenses, yes.

Q. And all of those expenses which the partner-

(Testimony of Dr. James N. Greear, Jr.)

ship paid were office expenses, were they not?

A. They were a portion of the office expenses.

Q. Well, did the firm pay anything other than office expenses? A. The firm did not, no.

Q. In other words, everything the firm paid was office expenses?

A. What the firm paid are the expenses of running the office and each individual doctor paid any additional expenses connected with the practice of medicine.

Q. Yes. Now the net income of the partnership, after the partnership had paid the office expenses of the partnership, was divided among the partners on a percentage basis, was it not?

A. I think that is correct.

Q. And it was done in accordance with the agreement among the partners?

A. That is correct.

Q. On a percentage basis? A. Yes.

Q. Now the partnership filed an income tax return, did it not, every year with the United States?

A. That is right. [91]

Q. And with the District of Columbia?

A. That is right.

Q. And in that income tax return it showed and claimed deduction for those office expenses paid by it, did it not?

Mr. Garroway: Objected to as irrelevant. We are not concerned with what deductions for income tax purposes were.

The Court: I apprehend that counsel is perhaps

(Testimony of Dr. James N. Greear, Jr.)
getting into something more definite than that.
Objection overruled.

Q. Will you answer the question, Doctor.

(Question read.)

A. It certainly did.

Q. And those returns show the distribution of the net income of the partnership to all partners in the firm, did it not? A. Yes.

Q. So the net amount which you received was after the office expenses had been paid by the partnership, is that correct?

A. After the office expenses?

Q. Yes.

A. That's right, to the extent that the partnership paid.

The Court: This witness has said other expenses were paid by them in their respective affairs of practice.

(Noon recess taken.)

1:30 p.m.

DR. GREEAR

resumed the witness stand on further [92]

Cross Examination

Q. (By Mr. Hilland): Dr. Greear, in July, 1949, when the agreement of July 13, 1949 was entered into, and prior to that month of that year and during years preceding the year of 1949, when you received your share of the profits of the partnership composed of Drs. Burke, Greear and Dow-

(Testimony of Dr. James N. Greear, Jr.)

ney, did you pay your dues and membership fees in the medical societies? A. I did.

Q. And under those same facts and circumstances did you pay expenses of your professional entertainment? A. Yes.

Q. Did you, under the same facts and circumstances, pay the expenses of attending medical meetings? A. I did.

Q. Under the same facts and circumstances did you pay for the medical journals to which you subscribed? A. I did.

Q. Under the same facts and circumstances did you pay for the professional insurance that you bought for covering your professional liabilities?

A. I did.

Q. And did you pay the interest on monies you borrowed? A. I did.

Q. And did you pay the expense of operating your automobile, your personal automobile? [93]

A. I did.

Q. The partnership did not furnish an automobile?

A. It wasn't arranged in our partnership.

Q. And depreciation on your personal automobile was taken by you personally?

A. It was taken as part of my operating expense as a physician.

Q. Now going back to the dues and membership fees in professional societies in the year 1952, for which you claim allowance of \$618. Did that include the Medical Society of Virginia?

(Testimony of Dr. James N. Greear, Jr.)

A. Medical Society of Virginia?

Q. Yes.

A. Yes, dues of medical societies, certainly.

Q. In what amount?

A. I couldn't tell you. I think probably seven dollars a year.

Q. And did it include the dues in the District of Columbia Medical Society? A. Yes.

Q. In what amount?

A. I couldn't answer that.

Q. You weren't practicing in Virginia in 1952, were you? A. I was not.

Q. What was the necessity for having membership in medical societies of those two jurisdictions?

A. The necessity for having those is very simple, in that my license to practice medicine in the State of Nevada is based upon [94] my having license to practice in the State of Virginia and the District of Columbia.

Q. Do you maintain membership in those two medical societies at the present time?

A. I do. It is obligatory.

Q. Now your membership dues in those societies was \$618, in all societies? A. Yes.

A. Six hundred eighteen dollars in 1952, \$359.96 in 1955. Will you explain the difference?

A. I don't know the exact difference, but the only explanation I can give is there were probably assessments paid in medical societies, some of them, would make a difference in the amounts.

Q. And what was the reason for the difference

(Testimony of Dr. James N. Greear, Jr.)

between 1953, when the total amount was \$428.50?

A. I can't answer that. I just stated that many of the societies set assessments in order to function, and that is the only explanation I can offer for the difference in the amounts in the different years.

Q. Under the heading of "Entertainment" you have claimed a deduction of \$720 for the year 1955, is that correct?

A. That is correct.

Q. That is the first time you ever claimed any deduction for entertainment, is it not?

A. I guess it is the first time. [95]

Q. You didn't claim any for 1952, 1953, or 1954, did you?

A. I did not.

Q. And you never claimed any such item of deduction for any year prior to 1952, did you?

A. I never claimed it before I was advised that that was a proper deduction and the reason for it was that I didn't realize it was a deductible item in the expense of an office, and therefore had not claimed the deduction prior to 1955.

Q. Did you keep any record of your disbursements for entertainment purposes in 1955?

A. Not specifically, but I could, if occasion arises, produce evidence as to the actual expenditures of that amount of money.

Q. You kept no account covering entertainment?

A. Except for checks I have written for such entertainment.

Q. But your books and records you kept no account under the heading of entertainment?

Mr. Garroway: If the Court please, I would re-

(Testimony of Dr. James N. Greear, Jr.)

mark here that as I have understood the stipulation heretofore entered into, with respect to Exhibit 4, it is that the figures are correct and I think perhaps it is taking the Court's time, as well as the rest of us, to interrogate this witness now as to figures. I object on that ground.

Mr. Hilland: If I remember correctly, he went into it on direct examination. That is my best recollection.

Mr. Garroway: Not as to figures. There is just a [96] different recollection of mine.

The Court: He went into items, but not the figures.

Q. Let me ask him this question. That is an arbitrary figure, is it not?

A. No, that figure was based upon actual expenditures which I was able to determine from my check books and checks that were written in payment of items that were necessary in entertainment.

Q. Didn't you tell Mr. Semenza that it was an arbitrary figure of sixty dollars a month?

A. I have no recollection of that.

Q. Under the heading of "Medical Meetings" you have claimed two items, one for direct expenses, in the amount of \$987.61, and one denominated "Arbitrarily Allocated," \$630, for the year 1952, or a total of \$1617.61 for that year. You have no record of the \$630 item, do you?

A. The six hundred thirty dollar item?

Q. Yes.

A. It was a figure that was set, or discussed,

(Testimony of Dr. James N. Greear, Jr.)

with the Internal Revenue representatives, as being an allowable figure for hotels, meals, and things of that sort, incidental to a medical association meeting, amounted to a per diem, which they considered was allowable.

Q. If the \$630 covers your hotels, meals, etc., what does the direct expenses of \$987.61 cover? [97]

A. The direct expenses is primarily transportation.

Q. From where to where?

A. Well, I usually make anywhere from two to three trips attending medical meetings to Washington, to Chicago, New York, places that are remote from here, and the actual plane fare on those trips runs to something well over three hundred dollars for a round trip.

Q. On those trips you paid your hotel expenses and meals by check, did you not?

A. That is correct.

Q. And the hotel and meals were included in direct expense of \$987.61? A. Not at all.

Q. Why do you call the \$630 an arbitrarily allocated item?

A. I didn't call it that. It was called that by Mr. Semenza.

Q. And included in that item—who created the term "Direct Expenses"? A. Mr. Semenza.

Q. On your books, when you paid a hotel bill covering your room and meals at a medical meeting, you have a bookkeeping entry for that, do you not?

A. On my books?

(Testimony of Dr. James N. Greear, Jr.)

Q. Yes.

A. No. I have my cancelled checks.

Q. But you have a record of that in your office?

A. Yes, that's right.

Q. This \$630 item, didn't you testify that that covered items concerning which you have no record?

A. Which I do have a record. Rather than keeping account of every penny I spend in attending these meetings or traveling to and from them, the Internal Revenue Bureau allows one to take an arbitrary figure that we consider is adequate to cover expenses and that is what this arbitrarily allocated item covers.

Q. Now you said you discussed that figure of \$630 with a representative of the Internal Revenue.

What was his name?

A. I couldn't tell you.

Q. When did you discuss it with him?

A. I discussed that in 1949.

Q. And where did you discuss it with him.

A. In Washington.

Q. You never discussed this item of \$630, this specific item, with him, did you?

A. I did not.

Q. And isn't it true that you never discussed any of the items under the years 1953, 1954, and 1955, denominated as arbitrarily allocated items?

A. I never discussed them with the Internal Revenue because I had already discussed it prior to then.

Q. And you can't give us the name of the agent with whom you discussed it? [99]

A. No.

(Testimony of Dr. James N. Greear, Jr.)

Q. Nor the time or place?

A. I told you it was in Washington in 1948 or '49.

Q. And where was it in Washington that you discussed it? A. In my office.

Q. What was the occasion for that discussion?

A. I can't tell you. I don't remember what it was.

Q. Well, on these arbitrarily allocated items, did you not tell Mr. Semenza that those were items concerning which you had no records?

A. I have no recollection of telling him such.

Q. You claim total disbursements in 1955 for attending medical meetings of \$3,683.53. Now how much of that \$3,683.53 do you have any records?

A. Attending these medical meetings?

Q. Yes.

A. Oh, I probably have records of all of it, or essentially all of it.

Q. Now in that year you claim a deduction of \$1327.50 for arbitrarily allocated expenses. Do you have any records covering that item of \$1327.50?

A. I am sure that I have.

Q. Do you have any of those records with you?

A. I have not.

Q. You claim for the year 1954 for the same item of arbitrarily [100] allocated expenses, \$1560. Have you any records with you covering that item?

A. I do not.

Mr. Garroway: Your Honor, I still think we are discussing figures and I object on that ground, be-

(Testimony of Dr. James N. Greear, Jr.)
cause the stipulation was to admit the statement and the only objection was as to the categories.

Mr. Hilland: On the arbitrarily allocated figures was the point I told your Honor I had to renege on.

The Court: I don't know why you reneged. This matter respecting these figures was accepted as true, so far as the figures are concerned. The only thing we are concerned with is the proper breakdown. That is the only question before the Court.

Mr. Hilland: I told your Honor, in the course of the discussion, those figures which I can not stipulate to were those under "Arbitrarily Allocated."

The Court: Let us strike the stipulation out that is in the record now, if you are telling me that your stipulation does not mean all that I understand it to mean.

Mr. Hilland: No, I am not telling the Court that at all. If the record shows, as your Honor indicates, that we stipulated to all these figures, I am willing to abide by it.

The Court: I asked you if the figures were stipulated [101] to and you said yes.

Mr. Hilland: If I remember, I asked the Court's permission to have the single right to object to that part of it.

The Court: We can have another stipulation.

Mr. Hilland: I think that will clarify the point I am making, that I did have that reservation in reference to figures, only that one.

The Court: If you have one reservation, then the

(Testimony of Dr. James N. Greear, Jr.)

stipulation does not stand. If in your use of the word "reneging" you mean you were holding something out, then I misunderstood you.

Mr. Hilland: That is what I said. I said I couldn't accept those figures. Those are the ones I am inquiring about now.

The Court: That might have been your intent, but you certainly didn't tell the Court that in so many words, because my clear impression is that these figures were taken as correct from data submitted by this witness to the accountant. The only information that we were concerned with was whether they had been allocated to the proper categories, and you were going to have a set made up to confirm that.

Mr. Hilland: Well, I will withdraw that question. I assume your Honor is sustaining the objection to that question.

The Court: No, counsel, it isn't this particular question. [102] This goes to the whole basis of this exhibit. I assume that the Court is going to be able to take this statement and the figures as correct, and the columns are correct. The only difference would be as to how the plaintiff set them up on one side and the defendant set them up on the other side. Now it appears that we are going into the very merits of the statement made by the accountants.

Mr. Hilland: Obviously there was a misunderstanding about these particular items. Needless to say, I can assure the Court that I certainly

(Testimony of Dr. James N. Greear, Jr.)

wouldn't inquire on that if I had intended to stipulate as to those particular figures.

The Court: Apparently, counsel, it was a misunderstanding. We might as well get the record made on it, so I think you had better state to the Court, Mr. Hilland, for the purpose of the record, what it is you propose to stipulate to, so we can see where we are going.

Mr. Hilland: What I told your Honor at the outset when I stood up was that we would not stipulate all of these figures, but I thought that your Honor was the judge of whether or not they are proper deductions and that we were not going to allow the accountant to decide the questions which should be decided by the Court and your Honor said of course if that was the case, you would not circumvent that. [103]

The Court: You properly interpreted the Court's comments.

Mr. Hilland: And then when I got into the figures, I told your Honor that there was one group of figures I would have to renege on and that was under "Arbitrarily Allocated" expenses for attending medical conventions.

The Court: Isn't it simple for you to set up in your columnization what you don't feel should be properly allowed as an expense and if you want to take the total sum of the travel expenses, you just show it?

Mr. Hilland: That's right.

The Court: In other words, we have the overall

(Testimony of Dr. James N. Greear, Jr.)

figures to a certain sum. The witness testified the accountant took from his figures and record he supplied. I frankly can't see why we should start breaking down like a tax evasion case. The case, so far as I am concerned, is to how these many items from the columnization, to make the information you desire, are pertinent to the Court.

Mr. Hilland: I will go to something else, then, your Honor.

Dr. Greear: Your Honor, during the lunch hour I refreshed my memory on the allocation of office of the partnership in Washington. It is over seven years now, this isn't very fresh in my mind, but each member of the firm, who was practicing under [104] this agreement, received so much money each month, he received a definite amount, and then twice a year the surplus over that was divided, depending on certain percentages, between the other members, and we paid all running expenses of this office. We didn't pretend to pay all the expenses incidental to the practice of medicine. We did, however, pay the immediate expenses connected with the office, and each man individually paid, out of his own amount he received from the office, his net income from the office, for medical meetings, medical dues, for his insurance, malpractice insurance, or upkeep of his automobile, for a great number of items which are incidental to the practice of medicine, and the reason for that was very simple, in that one doctor might attend a dozen meetings a year and another might attend one, so that we felt

(Testimony of Dr. James N. Greear, Jr.)

it was unfair for the fellow who only attended one meeting to contribute for expenses of the fellow who attended a dozen meetings. The same as to our automobiles, and so on.

The Court: I think the Court understands the import of your testimony, Doctor, and I realize that your testimony was just as you said, the partnership paid certain general expenses, the doctors making up the partnership bore other items of expense. Now as to the division of partnership earnings, I understand now that each doctor had a definite drawing amount each month which was, I suppose, computed to be within a safe margin of the total. Then at intervals [105] of some months apart, they divided up the surplus.

A. That is correct.

Q. That was done quarterly, was it not, Doctor?

A. I think it was done semi-annually. My recollection is not very clear on this, because it has been a long time ago.

Q. Doctor, Mr. Semenza's report shows the items in this statement, report for auto expenses and depreciation for the years 1953, 1954, and 1955 represent 100 per cent usage of Dr. Greear's automobile in his practice. This morning you said that those figures represented eighty per cent?

A. That is correct.

Q. You told Mr. Semenza that they represented one hundred per cent, did you not?

A. I did not.

Mr. Hilland: Your Honor, I don't know quite

(Testimony of Dr. James N. Greear, Jr.)

how we should handle that, in view of that—I presume he is bound by the report of one hundred per cent, but he did say on direct examination this morning it was eighty per cent.

Mr. Bartlett: That is correct, and counsel is asking many questions and I assume the questions are asked in good faith and the witness will be brought here to impeach, otherwise your questions are not asked in good faith when you ask the witness, did you tell so and so, so I can assume Mr. Semenza would be here concerning classifications; otherwise, we would object to questions along that line. [106]

Mr. Hilland: I am basing this on Mr. Semenza's report.

A. I have no recollection of telling Mr. Semenza that. I have an accountant make out my income tax return and he has discussed it with the Internal Revenue representatives and they agreed that was an adequate deduction, so far as expense of automobile was concerned.

Mr. Hilland: What I am trying to point out, your Honor, is their direct examination that impeached the stipulation, that if the testimony of this witness——

Mr. Bartlett: It didn't impeach the stipulation. The stipulation was the report could go in for whatever weight the Court would give it.

The Court: The understanding was whatever weight as to the various allocations, not true statement of fact as to the figures.

(Testimony of Dr. James N. Greear, Jr.)

Mr. Bartlett: Certainly I don't think there was any stipulation that any statements contained in the accompanying letter were true or untrue or in error or not in error.

Mr. Hilland: The whole of it was admitted.

Mr. Bartlett: Certainly.

Mr. Hilland: Certainly the statement is explanatory of the figures.

Q. Now, Dr. Greear, you said that eighty per cent is the amount the Internal Revenue representative told you was a fair apportionment to your professional use of the car. What Internal Revenue [107] agent told you that?

A. First, I didn't state as you asked the question.

Q. What did you say?

A. I stated that the accountant who made out my income tax return discussed this with the Internal Revenue agent and obtained from him the information that eighty per cent use of the cost of operating my automobile was a deductible item. I am sure it is, or more.

Mr. Hilland: That's all.

Mr. Garroway: That's all.

The Court: You may be excused, Doctor. Any further witnesses?

Mr. Bartlett: Your Honor, one question has come up and I will ask counsel to stipulate, so we might avoid taking further testimony.

I will ask counsel to stipulate that all of these earnings which are shown on Exhibit 4 in evidence

were the community earnings of Dr. Greear, the defendant, and his present wife. They were married June 15, 1951.

Mr. Hilland: I will go so far as to stipulate this—all of these earnings were professional earnings of Dr. Greear in Exhibit 4, subsequent to his marriage to the present Mrs. Greear in 1951. I believe the rest of the stipulation may well be considered conclusion of law, which I do not believe I should stipulate to. As to whether or not this is community property, [108] is a matter of argument.

Mr. Bartlett: Would you further stipulate that it was all earned while the Doctor and the present Mrs. Greear were living together in the State of Nevada and was earnings in the State of Nevada?

Mr. Johnson: Yes.

Mr. Bartlett: I think that is sufficient.

The Court: The stipulation is that the earnings referred to in Exhibit 4 were earned by the Doctor while married to his present wife, while engaged in practice in Nevada and both living in Nevada.

Mr. Bartlett: Your Honor, might I have the Court's indulgence a moment to examine this. There may be some separate income of Mrs. Greear.

The Court: Yes.

Mr. Bartlett: That is all.

The Court: You are referring to this last stipulation?

Mr. Bartlett: Yes, your Honor.

The Court: You have nothing further to offer. Let the record show that once again the defendant

rests. Gentlemen, I am still not happy about the stipulation on this Exhibit 4. I wonder if we could again have a stipulation on this, in view of the confusion that has been created as to what has been stipulated. [109]

Mr. Garroway: Of course, my comment on that at the moment is we have examined this witness and gone through the trial, and rested on the basis of the Court's understanding of the first stipulation. I would be loathe to withdraw my agreement to that stipulation as originally presented. I would be glad to do anything of assistance to the Court, but I am loathe to withdraw that stipulation, inasmuch as I acted under that stipulation ever since.

Mr. Hilland: May I ask the Court's indulgence?

The Court: Yes.

Mr. Johnson: May it please the Court, I have discussed with counsel—the stipulation presently is that Exhibit 4 will be admitted in evidence, that the figures contained therein, as explained, are correct, not arguing about what the figures state. If there is any argument, the argument will be as to whether or not they should be allocated as usual, ordinary, reasonable expenses of running of an office, under the definition contained in the contract, but the figures even as such, even those arbitrarily allocated upon the basis of thirty-five or forty-five dollars per day for the number of days claimed, according to the report, are correct.

The Court: That satisfied the Court, gentlemen. That, of course, applies also to prospective Exhibit No. 5, the same stipulation in relation to the cate-

gory of those figures is admitted by counsel for the defendant? [110]

Mr. Garroway: That is correct.

Mr. Johnson: We assume that those figures will be in main identical to these.

Mr. Garroway: Is this correct, that the new statement which will be submitted, Exhibit 5, will contain all items you have not objected as to categories and with the same figures as they now are on the present Exhibit 4?

Mr. Johnson: For gross income.

Mr. Garroway: And all your objected items will be allocated in toto from the new statement, Exhibit 5?

Mr. Johnson: That is correct, which means perhaps the figure for net income will be changed.

Mr. Hilland: There will be one other change in the figure, but it will be for the benefit of the defendant, your Honor. When he adjusts depreciation, as I understand it, he is going to take out of this statement only depreciation on Dr. Greear's automobile. He is going to leave in any depreciation allowances that is in those figures for his office equipment, other than his automobile and, of course, that is for the defendant's benefit, not ours.

The Court: Well, the Court is not very skilled as a certified public accountant, but it would appear that perhaps the very same figures that are now used in Exhibit 4 appear just in their present relationship [111] in Exhibit 5, but they are proper.

Now here is something that the Court is inter-

ested in. In connection with anything before the Court, like what you gentlemen think is owing or not owing to this plaintiff, I am going to tell you frankly I am not going to compute. I am not a bookkeeper, that is not my judicial function and in the pre-trial order this statement was made: "Since each party has a definite theory of how the payments should be computed, then it is a routine matter for each to prepare a chronological schedule of monies due from defendant under terms of the agreement, as he or she may interpret its provisions." Now the same thing can be done by the other side. The Court then takes that step by step and adjusts the items and arrives at its own conclusion, but do not be misled by that, that I am going to expert your bookkeeping, because I am not. Do you see what I mean, gentlemen?

Mr. Johnson: Yes.

Mr. Hilland: My thought on that, in discussing it with Mr. Johnson, was that the Court is confronted as of today with one additional proposition. You have concern with which of the items of expense are to be included, and then the Court must further determine whether this income, this is community income, and if it be community income, whether or not the present [112] Mrs. Greear is entitled to her one-half and whether income referred to in the agreement is then to be fixed only on the basis of Dr. Greear's one-half of the community. When those two questions are determined, then we will have the ability to figure out exactly what his income has been and then I think we could

submit on our sliding-scale basis, based on the agreement of what we feel is true.

The Court: As I see it, all this Court is concerned with is the contract. In other words, I am not going to make a problem ahead of time.

Mr. Bartlett: As I see it, there are two questions for the Court to determine—one is what expenses are going to be allowed in computing net income; the second is, when we get the net income figure, the Court must determine whether or not that is community income, and if it be community income, then under the agreement it would be our position that Dr. Greear's one-half of the community would be the income which would be referred to in this agreement, by which his monthly payments would be fixed. When the Court has determined those two questions, then we can apply them to the agreement.

The Court: That is all right, but I don't see where those particular things brings the Court to the point where it has to base on whether it is community or not. The agreement doesn't say community. The agreement says income. [113]

Mr. Bartlett: Yes, your Honor, but the agreement refers to net income of Dr. Greear.

The Court: Right.

Mr. Bartlett: Now if Mrs. Greear, the present Mrs. Greear, has an interest in the community earnings, she has half she can do with as she sees fit and the Doctor has half that he can do with as he sees fit, then it is our position that the income referred

to in this agreement would be Dr. Greear's one-half of the total community income.

The Court: I don't see it. Dr. Greear has an income before there is anything, and the fact that by his efforts he creates an income, then the law comes along and says, "Now we will take that income and make it community property in which Mrs. Greear is entitled to one-half." Now I am not saying what the Court is going to decide in this case, but I am thinking about what looks to be the rugged points of this case. If the Court should determine that this contract is to be construed with utter disregard of any community law, the Court has really construed nothing more than the contract and the judgment and attempted to construe it under the law. Then, on the basis of that, the plaintiff computes a certain amount of money due under the theory that the Court bases upon. Then the plaintiff will issue execution [114] and that is where it appears to me that your theory of community property, and the circumstances in relation to it, come into play for the first time, because then you have raised the question that if it be true the defendant, according to the ruling of the Court and construing of these particular accountants, whatever the figure might be, execution can only be issued against the separate property of the Doctor or against his proportionate share of the community. That is the question you have raised there.

Mr. Bartlett: Yes, I think the question has a two-fold aspect. In other words, making execution on what type of property can be divided and then

at that time the Court has to determine the nature of that property. But, your Honor, we think this is a very important point and I think I can illustrate by reverse situation. Suppose the present Mrs. Greear had signed an obligation, we will say, to pay so much a month and this suit were on that agreement and she is a housewife, as she now is, and the only income she has is her share of the community income, wouldn't the law be very strange and unfair one if she would then be totally freed, which would be the result, from any obligation to pay her one-half of the community funds in compliance with that agreement, simply because she didn't go out and work? Suppose Dr. Greear was not well and Mrs. Greear got a job and began to support him—community earnings, community income. Would that [115] then exonerate the Doctor from any obligation under this agreement?

The Court: Any argument as to concerning the applicability of community property to an indebtedness or liability, has nothing to do as to whether or not Dr. Greear is personally required to fulfill payments under a contract which he signed. Now whether or not the plaintiff, if the plaintiff should be fortunate enough to come with a judgment, whether the plaintiff can come against the separate property of the doctor, separate property of the wife, community property of both, is a matter to be determined at the time the plaintiff seeks to enforce judgment and get the money.

Mr. Bartlett: Then your Honor's interpretation

is that the agreement, of course, refers to his income?

The Court: Yes.

Mr. Bartlett: Your Honor's interpretation would then be if he were not employed but the present Mrs. Greear were employed and bringing in five thousand dollars a month to the community, that under the terms of this agreement he would then have no income, is that correct?

The Court: Well, I am presently not interpreting anything. I am saying that my job is to interpret the contract and the judgment. Those are facts which the Doctor himself is responsible for. He entered into the contract, no question about that. The judgment [116] confirms it. The only thing we are concerned with at the moment is what that contract means in relation to his earning power, his net income. Now you may argue community property says half of it goes to the community, then community has a bearing on what is his income, but as to who is responsible to pay any judgment, whether separate property or community, has nothing to do with the Court. If I am wrong, I want you to tell me.

Mr. Bartlett: That is correct, but my point is this, in interpreting the agreement, when it refers to his gross income, do you also include actual income of Mrs. Greear? Suppose she were employed?

The Court: We haven't any testimony before the Court that there was any income of Mrs. Greear's.

Mr. Bartlett: I think by reading the contract,

the phrase is earnings from the practice of his profession, and all it refers to there is his income. Now his income is one-half of whatever the community earns. I therefore think at this time your Honor must decide this question, as to whether or not the fact a husband is the one earning the community income means that this is all his income, or does it mean that one-half of it is his income?

The Court: Now you say by virtue of the income community property law, that the income of Dr. Greear is [117] only one-half of what he makes. What is the other half?

Mr. Bartlett: The other half belongs to Mrs. Greear.

The Court: All right, it belongs to him who earned it.

Mr. Bartlett: He earned it, but it is not his income. He doesn't pay taxes on it, she pays taxes on it.

The Court: The contract doesn't say that. What I am trying to put out to you is this—that as in every case, the Court has very little free choice. It is bound by the exhibits and the evidence and this case is very simple; first, a contract entered into between the doctor and his former wife. Now that can't be changed one iota. The only job the judge had to do on that is to determine in one respect, and one respect only, what is meant by his net earnings. Now that binds the Court, as well as Dr. Greear, as well as the former Mrs. Greear. Now when I determine that, all of your problems concerning community property are in the future. That

may be the end of the problem. The doctor might not have to pay anything, he might find he has to pay, so we have no problem now, but if he does not pay, then the plaintiff is going to seek an execution then, for the first time, the community problems will become involved, as to whether or not community in this State is responsible [118] for a contractual obligation.

Mr. Bartlett: Yes, but your Honor, I will have to take serious issue with your Honor on one point.

The Court: I assume you will take serious issue on everything.

Mr. Bartlett: No, your Honor. I think that there is a real serious question before the Court at this time as to whether or not the fact that we have a community income under the community property law in this State and therefore all earnings after marriage of either spouse go into community property, that when you have an agreement drawn in a State where they do not have a community property law, you can't say at that time that the parties understood all of the meanings of the language of the agreement that they were signing, and you can't say, I don't think, that a man can sign an agreement in a non-property State and then be forbidden to go to a community property State to make his living, if he so chooses, and I think you can't say to the spouse, the second spouse, with whom he made money in the community property State, all the other community property wives in this State are entitled to one-half of their hus-

bands' earnings, they pay the taxes on it because it is community earnings. Contrarywise, he is entitled to one-half of their earnings, if they happen to be employed; that your income, your husband makes ten thousand a year, your community income, if your husband has not previously been married and entered an agreement, will be five thousand a year and your husband's [119] will be five thousand a year. But if you marry a man who has entered into an agreement in another State, where he signed the agreement stating that, based upon his income, so much of that income shall be paid when it is a certain rate and so much at a lesser rate and so much at a lesser rate, then under those circumstances you are different from any other wives, because your income goes into that agreement and it is not his income, at least for purposes of determining how much to pay the former wife.

The Court: When the execution is issued, she can present herself and assert her community interest in there. That is inevitable.

Mr. Bartlett: All right, your Honor, that is the wife. How about the husband? He has signed an agreement, at the time he knew nothing about community property, probably knew nothing about coming to a State where they had it. He signs an agreement, such as he did here, so that at the figure of \$17,500 he pays \$600 a month, plus certain other monies, and say he makes eighteen thousand. Now nine thousand of that does not belong to him. That belongs to his new wife. Six thousand, if your Honor's interpretation is correct, six thousand of it be-

longs immediately to the ex-wife under the terms of that agreement, and I do not know how much belongs to the children, they have not computed that, but it seems to me immediately the man is to be in a position where he can not possibly get by, except if his present wife chooses to support the community with her half of the funds. Now [120] maybe that is as it should be and maybe that is as it shouldn't be; nevertheless, I think when a husband takes up his earnings—I can see some very bad results if the Court's final ruling is that community income is what measures this term, "his gross income" from all sources, if their community income is what measures that, then as a matter of logic in this case, if Mrs. Greear were now working and bringing five hundred dollars a month into the community, and logically you have to say that is community income, all community income, because the agreement, your Honor, never does say anything about net earnings or anything like that. I think that is possibly read into the agreement, but I honestly do not see how the Court can escape deciding this question in this proceeding here—should the Doctor's income and Mrs. Greear's be used to measure the amount of money Dr. Greear has to pay under this agreement, and I think it is just as pertinent, when you use that measuring stick, just as logical, if she had community income as when you take his entire earnings. I can conceive a place where he wouldn't make enough to comply with the agreement each year and pay his income taxes. That, I think your Honor, is the

practical measuring stick to interpret this agreement.

The Court: At the time the agreement was entered into should determine in the light of the law of the jurisdiction where this agreement was entered into, and then you start searching the document itself. Let me point out that this contract, in a great many respects, [121] is very definite and very detailed. It starts with \$17,500 and carried a sliding scale down under \$7200 and every contingency is provided for, so one can assume that the respective parties, through competent counsel, had pretty well determined every one of the happenstances. Now net income is even defined, and that is something you do not find very often. You find the definition of what royalty consists of in a mining agreement, but I think probably this is unusual in a property agreement. The meaning of that phrase is gross income from all sources of his income, less his usual, ordinary and reasonable office expenses and tax payments for the year. Now as you say, neither of the parties had any contemplation of the community property law at that time, so we must assume it wasn't made in contemplation of community property effect. But I still keep very definitely divorced the matter of reversing a judgment from the matter of construing this contract. In one you have to meet the community property problem, in the other, in construing, as it is bound by it, it is merely one of the weights which you say the Court should consider in arriving at the construction.

Mr. Bartlett: Yes, I think that, your Honor. In other words, the agreement certainly was entered into without [122] thought that Dr. Greear would be earning fees where one-half of those fees would belong, as a matter of law, to his new spouse. It was entered into without any thought that if the new spouse contributed her earnings to the community that they might possibly be used as a measuring stick. With that thought in mind, it seems very clear that if Dr. Greear is now forced into the unconscionable position where he cannot make his income—his income has about reached the state where I think it can be demonstrated by paying his income tax, paying six thousand to her and trying to pay the judgment back in Virginia, which incidentally was based upon a decision where the question of community property was not raised—would put him in a position where, unless his wife helped out of her share of the community, he just wouldn't be able to get along, and I do not think, let us say, had that been explained to the parties at the time, then you might say he entered into this agreement by his own free choice and he must be bound by it.

The Court: Yes, but isn't that the very assumption, that everyone enters into an agreement knowing what he is doing? He is advised by counsel. If I enter into an agreement that works out a hardship on me, that is no reason why the Court should set it aside, unless fraud is committed or something like that. You know that; I can't move.

Mr. Bartlett: On the other hand, if you sign an

[123] agreement, not having any idea as to one factor, if the factor is left out of the agreement, something completely different and new——

The Court: You are talking about reformation now.

Mr. Bartlett: No, I am not. If it is left out of the statement. Your Honor has stated that they obviously did not consider community property. Certainly they did not. The question is, if they had considered, would they have drawn this same type of agreement, or another? Now, not having considered it, then your Honor must weigh the intent of the parties concerning this agreement, as to any weight one way or the other. It seems to me they are now in a position of strictly a legal interpretation of what is Dr. Greear's gross income, when he makes his living here in the State of Nevada and when he is married to some one else. What does the law say his gross income is, because obviously the parties could not by definition define a term when they didn't know what type of income they are talking about.

The Court: Suppose the Doctor had continued—this, of course, is all discussion—suppose that Dr. Greear had stayed in Washington, D.C. and continued to practice there and there was no problem of community property, then the contract would be construed just the way it reads.

Mr. Bartlett: That is correct.

The Court: All right. Now that was the place [124] where the parties entered into the contract, where they both lived and the law that they were

both familiar with and as long as Dr. Greear stayed there, there would be no confusion as to the interpretation of what his earnings were. Now he comes to Nevada and you have advanced the argument that by virtue of the community property law in Nevada, his income is only half of what it is. Now surely that was not in contemplation of the first Mrs. Greear when she signed the agreement. It might have been in the contemplation of Dr. Greear at the time he signed it, but we will assume it wasn't in his contemplation either, so then you come to this situation, that the final interpretation and construction of the contract is based upon accident and chance, wherever the defendant might be. Suppose he had gone into a state, if we can conceive of such a situation, that just nullified property settlement agreements so they wouldn't be recognized. Of course, that is an assumption, but a party to a contract can't wander around the face of the earth, whether by chance or by design, and then compel the Court to interpret [125] a contract in the light most favorable to him.

Mr. Bartlett: That is certain, your Honor, and I think the fact that Dr. Greear remained in Washington more than a year is rather good evidence of the fact that he didn't have any thoughts about community property either.

The Court: Well, I am sure he didn't.

Mr. Bartlett: But at the same time it seems to me that if you are to give any meaning to the law of the State of Nevada concerning what is and what is not community income and what is the legal

effect of that income, that then you must allocate to the husband as his income one-half of what the community earns, and to the wife one-half of what the community earns as her income. Now then you go to this agreement and the phraseology that his gross income is the husband's actual income from all sources. Now certainly at that time they didn't have any contemplation that they could take, in measuring this, any lawful income of the present Mrs. Greear, because she wasn't then married to Dr. Greear. They couldn't take into consideration any of her lawful income in arriving at this figure. First, we look and determine what is her lawful income. Her lawful income is her separate property from earnings of the community, whether she or the Doctor earns it, so as a matter of sheer logic, if you put her income into this contract, I think you are reading in something that didn't exist. Maybe the parties didn't contemplate any such situation arising. It could be they didn't contemplate Dr. [126] Greear even getting a Nevada decree of divorce, but these things have happened and I think we now have to read the contract in the light of the things that have happened. Then we have a measuring device of the husband's actual net income and I don't think it would be improper for the Court, in arriving at the valuation point to use any lawful income of the present Mrs. Greear, and then the question is simply this, does the community income in this State constitute a part of her legal income or Dr. Greear's income.

The Court: That is exactly the target. Now I am

going to give you an opportunity for 30 days to advise the Court by memorandum of any cases you have. That is the essence of the case.

Mr. Garroway: May I have just one word?

The Court: Yes.

Mr. Garroway: I would like in the memorandum of the plaintiff if the plaintiff will set forth exactly what she is asking for in this proceeding. I am frank to say I am a little bit right now vague as to what she wants, based upon the complaint and evidence, so I would like to know just exactly, in a few short sentences, in the brief, what it is the plaintiff is claiming now in this action, and I think plaintiff would not have any objection to setting that forth to us.

Mr. Johnson: None whatsoever.

The Court: Do you mean in dollars and cents, or in [127] legal relief?

Mr. Garroway: Legal relief, and therefore the question before the Court.

The Court: I think you have the one point before the Court, speaking of whether or not, by virtue of the community law in the State of Nevada, that factor is to be taken into consideration in construing the meaning of the expression, "net income" as used in the contract. That is one thing. Now having passed on that, the rest of it is just calculation, isn't that correct?

Mr. Garroway: That is right.

The Court: Will you gentlemen stipulate then that this is the only question the Court will be required to pass on?

Mr. Garroway: That has to do with the amount he is to pay in this case?

The Court: Yes.

Mr. Johnson: Not entirely, because there is one cause of action relative to prayer for payments to reimburse the wife for sending the child to school, in addition to which there was a sum of a certain amount for monies which were incurred.

Mr. Garroway: Anyway, that is what I had in mind, no evidence or testimony and now it is just a matter of law. That is why I would like that point argued in the opening brief, as [128] well as the questions before the Court just now.

The Court: As far as what is before the Court, that is very simple. The basic point we are reaching from the testimony, other than probably comments in the briefs or allegations in the pleading, as to matters of schooling and allowances——

Mr. Garroway: Can the Court rule now that that question is entirely beside the case?

The Court: Well, the Court won't rule now, but you can treat it with as much respect as you feel it is entitled to. I personally do not think it is entitled to a great deal of weight at the present time, but I have been frequently in the embarrassing position where I would have to reverse my thinking after analyzing the briefs.

Mr. Garroway: Is it understood the plaintiff will file the opening brief and we will answer?

The Court: Yes, 30 days for the opening brief, 20 days for answering and if the defendant wants to reply 10; 30-20-10.

Mr. Johnson: May I ask this question, on this community property theory, it is not the intent of the Court to go behind the Virginia judgment, is it?

The Court: I think the Virginia court, of course, had no anticipation of the theory with which we are [129] concerned and went right along on the common law theory proposition. [130]

PLAINTIFF'S EXHIBIT No. 4

[Letterhead of Semenza & Kottinger, Certified Public Accountants, Reno, Nevada.]

February 27, 1957

Mr. James W. Johnson, Jr.
Attorney at Law
206 North Virginia Street
Reno, Nevada

Re: Mrs. Mary Schaaf Greear

Dear Mr. Johnson:

We have made an examination to determine the net income of Dr. James N. Greear, Jr., for the years 1952 through 1955 giving consideration to the expenses allowable as outlined in the agreement entered into between Dr. James N. Greear, Jr., and Mary Schaaf Greear, dated July 13, 1949. Our examination was made from data submitted by Dr. Greear's office consisting of bank statements, deposit slips, check stubs, cancelled checks and Federal income tax returns for the years mentioned.

Plaintiff's Exhibit No. 4—(Continued)

Income as recorded was in agreement with that reported in the Federal tax returns for the respective years.

The expenses as presented in the attached statement were determined by an analysis of checks written by Dr. Greear for the periods mentioned above. We were not furnished paid invoices supporting the various disbursements but we did have an opportunity to see cancelled checks covering these expenditures. We also discussed various expenditures with Dr. Greear and his accountant to determine the reason for the disbursement and whether it was applicable to the operation of his office.

The following comments relating to the expenses listed in the attached statement are submitted for your consideration:

The salaries paid were for services of a receptionist.

Dues and memberships consisted of yearly fees covering membership in various professional organizations to which Dr. Greear belongs. Such expenses are usual among professional men.

Entertainment expense for the year 1955 was estimated by Dr. Greear on the basis of \$60.00 per month. Other medical men, whose accounts we have examined, incur entertainment expense and the amount estimated by Dr. Greear appears to be comparable based on the gross income reported.

Expenditures for medical meetings consist of expenses paid directly by check, such as transporta-

Plaintiff's Exhibit No. 4—(Continued)

tion costs and hotels, while the arbitrarily allocated items cover an estimated expenditure for meals and entertainment of other persons in attendance of \$35.00 per day, while traveling, for a period of ten days in 1953, \$40.00 per day for 39 days for the year 1954 and 29½ days at \$45.00 per day for the year 1955. We were not able to determine the days involved in 1952. We are in no position to offer any comment on the amount claimed except to state that there was no verification of the expense nor of the days involved. We do know that professional men attend conventions and meetings in connection with their profession and expense is incurred in attending such meetings.

Insurance consists of malpractice coverage and fire insurance on office equipment and contents.

Auto expenses and depreciation for the years 1953, 1954, and 1955 represents 100% usage of Dr. Greear's automobile in his practice.

The interest paid on a loan, the proceeds of which was used to set up his office and provide for equipment, is reflected as expense of the office.

The other expenses listed, but on which we did not comment, are normal office expenses which are incurred in the operation of an office.

We noted in the brief submitted by Mr. Stuart B. Carter to the Circuit Court of Bath County, Virginia, that taxes other than income tax payments, medical society dues, medical conventions and meetings, medical journals and books, physician's liability insurance, auto expenses including

Plaintiff's Exhibit No. 4—(Continued)

depreciation, and interest, were not allowable deductions. It is our opinion that such items can be ordinary and necessary expenses of operating a professional office such as Dr. Greear's, as long as they apply to the production of professional income, however, if they are determined to be unallowable deductions they may be removed from our statement.

We call your attention to the fact that the income reflected in the attached statement is solely that of Dr. Greear, as we have eliminated the separate income of the present Mrs. Greear in preparing the computation. It has also been necessary for us to reduce the deduction for income tax paid by Dr. Greear in the respective years, by the amount of tax applicable to the separate income of Mrs. Greear which was included in the joint income tax return filed by Dr. and Mrs. Greear.

Subject to the foregoing comments and exceptions it is our opinion that the attached statement reflects Dr. Greear's net income for the years 1952 through 1955.

Yours very truly,

SEMENZA & KOTTINGER.

LJS/vys

Plaintiff's Exhibit No. 4—(Continued)

DR. JAMES N. GREEAR, JR.

STATEMENT OF INCOME AND EXPENSES

FOR THE YEARS 1952 THROUGH 1955

Income	1952	1953	1954	1955
Professional fees	\$23,496.85	\$31,023.25	\$33,324.00	\$35,674.00
Joint Venture:				
Ordinary income or (loss)	(	14.37)	12.85	(17.00)
Dividends			27.05	28.00
Capital gains		5.80	36.29	120.00
Total income	23,496.85	31,014.63	33,400.19	35,805.00
Expenses of Operating Office				
Salaries	2,637.50	2,775.00	2,716.25	2,782.00
Rent	2,480.00	2,520.00	2,520.00	2,520.00
Dues and memberships	618.00	428.50	606.75	359.00
Entertainment	—	—	—	720.00
Medical meetings—				
Direct expense	987.61	1,140.23	816.81	1,741.00
Arbitrarily allocated	630.00	350.00	1,560.00	1,327.00
Drugs and supplies	1,075.56	613.58	487.89	411.00
Repairs	87.86	14.55	32.98	32.00
Laundry	43.97	34.86	35.07	15.00
Telephone	582.62	630.21	838.88	723.00
Office supplies and postage	582.19	1,070.92	629.84	874.00
Payroll taxes	100.20	116.53	143.89	75.00
Personal property taxes—				
Office	113.75	50.00	50.00	50.00
License and registration				
fees	44.00	80.00	85.00	90.00
Medical journals	109.95	52.40	179.00	101.00
Professional insurance	136.54	168.70	111.50	256.00
Professional services—				
Accounting	40.00	45.00	100.00	125.00
Dictation and transcribing	83.64	—	—	—
Office moving expense	94.75	—	—	—
Interest	270.97	551.79	547.73	580.00
Auto expense	562.43	210.50	816.19	759.00
Depreciation	662.37	993.60	1,025.00	1,012.00
	11,943.91	11,846.37	13,302.78	14,561.00
Dr. Greear's net income	11,552.94	19,168.31	20,097.41	21,244.00

Plaintiff's Exhibit No. 4—(Continued)

Subject:	1952	1953	1954	1955
Income tax for year	2,821.66	5,903.68	4,294.54	4,281.14
Adjustment for				
Portion applicable to				
Wife's income	(396.44) (	1,073.88) (	219.45) (	22.69)
	<u>2,425.22</u>	<u>4,829.80</u>	<u>4,075.09</u>	<u>4,258.45</u>
Income	<u>\$ 9,127.72</u>	<u>\$14,338.51</u>	<u>\$16,022.32</u>	<u>\$16,986.09</u>

PLAINTIFF'S EXHIBIT No. 5

[Letterhead of Semenza & Kottinger, Certified
Public Accountants, Reno, Nevada.]

March 5, 1957

Mr. James W. Johnson, Jr.
Attorney at Law
206 North Virginia Street
Reno, Nevada

Re: Mrs. Mary Schaaf Greear

Dear Mr. Johnson:

We have made an examination to determine the income of Dr. James N. Greear, Jr., for the years 1952 through 1955 giving consideration to the expenses allowable as outlined in the agreement entered into between Dr. James N. Greear, Jr., and Mary Schaaf Greear, dated July 13, 1949. The agreement appears to limit the expenses that can be deducted from Dr. Greear's gross income to the usual, ordinary and reasonable office expenses and

Plaintiff's Exhibit No. 4—(Continued)

DR. JAMES N. GREEAR, JR.

STATEMENT OF INCOME AND EXPENSES

FOR THE YEARS 1952 THROUGH 1955

Income	1952	1953	1954	1955
Professional fees	\$23,496.85	\$31,023.25	\$33,324.00	\$35,674.80
Joint Venture:				
Ordinary income or (loss)	(	14.37)	12.85	(17.63)
Dividends			27.05	28.13
Capital gains		5.80	36.29	120.37
Total income	23,496.85	31,014.68	33,400.19	35,805.67
Expenses of Operating Office				
Salaries	2,637.50	2,775.00	2,716.25	2,782.50
Rent	2,480.00	2,520.00	2,520.00	2,520.00
Dues and memberships	618.00	428.50	606.75	359.96
Entertainment	—	—	—	720.00
Medical meetings—				
Direct expense	987.61	1,140.23	816.81	1,741.03
Arbitrarily allocated	630.00	350.00	1,560.00	1,327.50
Drugs and supplies	1,075.56	613.58	487.89	411.58
Repairs	87.86	14.55	32.98	32.75
Laundry	43.97	34.86	35.07	15.99
Telephone	582.62	630.21	838.88	723.51
Office supplies and postage	582.19	1,070.92	629.84	874.97
Payroll taxes	100.20	116.53	143.89	75.00
Personal property taxes—				
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Medical journals	109.95	52.40	179.00	101.61
Professional insurance	136.54	168.70	111.50	256.82
Professional services—				
Accounting	40.00	45.00	100.00	125.00
Dictation and transcribing	83.64	—	—	—
Office moving expense	94.75	—	—	—
Interest	270.97	551.79	547.73	580.11
Auto expense	562.43	210.50	816.19	759.84
Depreciation	662.37	993.60	1,025.00	1,012.96
	11,943.91	11,846.37	13,302.78	14,561.13
Dr. Greear's net income	11,552.94	19,168.31	20,097.41	21,244.54

Plaintiff's Exhibit No. 4—(Continued)

Deduct:	1952	1953	1954	1955
Income tax for year	2,821.66	5,903.68	4,294.54	4,281.14
Less: Adjustment for portion applicable to wife's income	(396.44) (	1,073.88) (	219.45) (	22.69)
	<u>2,425.22</u>	<u>4,829.80</u>	<u>4,075.09</u>	<u>4,258.45</u>
Net income	<u>\$ 9,127.72</u>	<u>\$14,338.51</u>	<u>\$16,022.32</u>	<u>\$16,986.09</u>

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Plaintiff's Exhibit No. 5—(Continued)

DR. JAMES N. GREEAR, JR.

STATEMENT OF INCOME AND EXPENSES

FOR THE YEARS 1952 THROUGH 1955

Income	1952	1953	1954	1955
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Dividends			27.05	28.13
Capital gains		5.80	36.29	120.37
	<hr/>	<hr/>	<hr/>	<hr/>
Total income	23,496.85	31,014.68	33,400.19	35,805.67
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Salaries	2,637.50	2,775.00	2,716.25	2,782.50
Rent	2,480.00	2,520.00	2,520.00	2,520.00
Drugs and supplies	1,075.56	613.58	487.89	411.58
Repairs	87.86	14.55	32.98	32.75
Laundry	43.97	34.86	35.07	15.99
Telephone	582.62	630.21	838.88	723.51
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Payroll taxes	100.20	116.53	143.89	75.00
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Office	113.75	50.00	50.00	50.00
License and registration				
fees	44.00	80.00	85.00	90.00
Professional services and				
Accounting	40.00	45.00	100.00	125.00
Dictation and transcribing	83.64	—	—	—
Office moving expense	94.75	—	—	—
	<hr/>	<hr/>	<hr/>	<hr/>
	7,966.04	7,950.65	7,639.80	7,701.30
	<hr/>	<hr/>	<hr/>	<hr/>
Dr. Greear's Net Income ..	15,530.81	23,064.03	25,760.39	28,104.37
	<hr/>	<hr/>	<hr/>	<hr/>
Deduct:				
Income tax for year	2,821.66	5,903.68	4,294.54	4,281.14
Less: Adjustment for				
portion applicable to				
wife's income	(396.44)	(1,073.88)	(219.45)	(22.69
	<hr/>	<hr/>	<hr/>	<hr/>
	2,425.22	4,829.80	4,075.09	4,258.45
	<hr/>	<hr/>	<hr/>	<hr/>
Net income	\$13,105.59	\$18,234.23	\$21,685.30	\$23,845.92
	<hr/>	<hr/>	<hr/>	<hr/>

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had and the testimony adduced at the trial of the case entitled, Mary Schaaf Greear, Plaintiff, vs. James N. Greear, Jr., Defendant, No. 1261, held in Carson City, Nevada, March 5, 1957, and that the foregoing pages, numbered 1 to 82, inclusive, comprise a true and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, Nevada, May 26, 1958.

/s/ MARIE D. McINTYRE,
Official Court Reporter.

[Endorsed]: Filed May 26, 1958.

[Endorsed]: No. 16062. United States Court of Appeals for the Ninth Circuit. James N. Greear, Appellant, vs. Mary Schaaf Greear, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed: June 19, 1958.

Docketed: June 26, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 16,062
United States Court of Appeals
For the Ninth Circuit

JAMES N. GREEAR,

Appellant,

VS.

MARY SCHAAF GREEAR,

Appellee.

Appeal from the United States District Court
for the District of Nevada.

OPENING BRIEF OF APPELLANT.

VARGAS, DILLON & BARTLETT,

ALEX A. GARROWAY,

220 South Virginia Street, Reno, Nevada,

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No. 16,062

United States Court of Appeals For the Ninth Circuit

JAMES N. GREER,

Appellant,

VS.

MARY SCHAAF GREER,

Appellee.

Appeal from the United States District Court
for the District of Nevada.

OPENING BRIEF OF APPELLANT.

I. STATEMENT OF FACTS.

The above named parties, while husband and wife, entered into an agreement under date of July 13, 1949, settling among other things the right of the wife to alimony and support. The agreement, so far as this appeal is concerned, provides for monthly support payments by the husband to the wife of \$500 per month if the wife does not have to pay income tax on this sum, and \$600 per month if she does have to pay income tax and then reads as follows:

“However, if and when the husband’s annual ‘net income’ (meaning by that phrase his gross income from all sources of his income, less his usual, ordinary and reasonable office expenses and income, tax payments by him for that year) is

less than Seventeen Thousand Five Hundred (\$17,500.00) Dollars in any calendar year, the monthly payments to the wife for the succeeding calendar year shall be that proportion of Five Hundred (\$500.00) Dollars or Six Hundred (\$600) Dollars (whichever amount is then applicable) that Seventeen Thousand Five Hundred (\$17,500) Dollars bears to the husband's annual 'net income' during said immediately preceding calendar year in which his 'net income' is less than Seventeen Thousand Five Hundred (\$17,500) Dollars, but the minimum payments shall be Three Hundred (\$300) Dollars per month as long as the husband's annual 'net income' equals or exceeds Seven Thousand Two Hundred (\$7,200) Dollars per calendar year, and whenever the husband's annual 'net income' equals or exceeds Seventeen Thousand Five Hundred (\$17,500) Dollars in any calendar year, the monthly payments to the wife for that year and each and every succeeding year in which the husband's annual 'net income' equals or exceeds Seventeen Thousand Five Hundred (\$17,500) Dollars shall be Five Hundred (\$500) Dollars or Six Hundred (\$600) Dollars per month (whichever amount is then applicable according to the above provisions in relation to income taxes thereon) on the fifth day of each and every month commencing as of the fifth day of January of each of the years involved. *If, by reason of ill health, or any other cause, the husband's annual 'net income' should be less than Seven Thousand Two Hundred (\$7,200) Dollars per year, the rate of monthly payments by the husband to the wife shall be one-half of his annual 'net income', except that if that event occurs at any time during*

the time the husband is obligated for the support, maintenance and education of their two minor children or either of them, as hereinafter provided in paragraphs 5 and 6 of this agreement, the payments by the husband to the wife shall be reduced to one-third of his annual 'net income' during the period of time that he is so obligated for the support, maintenance and education of their said children or either of them. Whenever the husband's annual 'net income' is less than Seventeen Thousand Five Hundred (\$17,500) Dollars in any calendar year or less than Seven Thousand Two Hundred (\$7,200) Dollars in any calendar year, the husband shall furnish the wife, her agent or attorney, an itemized statement of his annual 'net income' and shall permit the wife, her agent or attorney, to make a detailed examination and audit of his books and records and income tax returns for the calendar years involved for the purpose of determining the accuracy of the itemized statement furnished by the husband to the wife, her agent or attorney. The wife agrees to sign a joint income tax return with the husband, at his request, until such time as she is required to make a separate return and pay a separate income tax on the money paid by the husband to her.'" (Emphasis added.)

Appellant obtained a divorce from appellee in Nevada in July, 1950; remarried; and since then has resided and practiced medicine in Nevada. (Tr. 40.) Although apparently no specific finding of fact was made as to the date of remarriage, it is not disputed that this remarriage occurred on June 16, 1951, and has been in effect from that date to the present time.

In filling out his income tax returns for the years herein involved, namely, 1952 to 1955, inclusive, appellant deducted from his income taxes as usual and ordinary expenses the following:

“Dues and memberships
Entertainment
Medical meetings
Medical journals
Professional insurance
Interest
Auto expense
Depreciation” (Tr. 134.)

At the time appellant signed the agreement of July 13, 1949, he was a member of a partnership which paid certain of the expenses such as office rent, secretarial help, etc., but each partner paid on the items mentioned in the preceding paragraph out of his share of the partnership income. (Tr. 105-106.)

In preparing the returns for the years herein involved the accountants excluded the separate income of Mrs. Greear and it is not disputed that during these years she had no community earnings as such. It is further undisputed that the income of appellant for the years in question, with insignificant exceptions, was from professional fees from his practice as a doctor specializing in the treatment of the eyes. The income for the years in question is shown in appellee's Exhibit 4 with all expenses deducted, and in appellee's Exhibit 5 with all except those expenses indicated above being included. (Tr. 128-136 inc.)

II. ISSUES.

1. Is the income shown in appellee's Exhibits 4 and 5 community property of appellant and his present wife?
2. If it is community property, should the present wife's share be included in determining "net income" as defined in the agreement of July 13, 1949?
3. Is appellant in fixing "usual, ordinary and reasonable office expenses" limited to the expenses which were paid by the partnership of which he was a member at the time he signed the agreement?

III. ARGUMENT.

PRELIMINARY DISCUSSION.

Preliminarily it is the position of appellant that the question truly involved is not one of interpreting the words in the agreement but rather of determining the property upon which the agreement should operate. The ownership of the property is a matter of law and must be determined by the laws of the State of Nevada where the appellant is domiciled.

41 *C.J.S.* 998 states as follows:

"Whether particular property is community or separate is a matter of law, and it is not dependent on the declaration or intention of the parties as to its status. The character of property as separate or community is fixed at the time of its acquisition and by the facts surrounding the transaction in which it was acquired, whether the property is realty or personalty."

In 11 *Am. Jur.* 991 we read as follows:

“As a general rule, the law of the matrimonial domicile controls the property rights of husband and wife * * *.”

ISSUE I. THE INCOME OF APPELLANT FROM HIS EARNINGS FOR THE PERIOD OF TIME 1952-1955 IS THE COMMUNITY PROPERTY OF APPELLANT AND HIS PRESENT WIFE.

Nevada law provides as follows:

Nevada Revised Statutes, Section 123.130:

“Separate Property of Wife, Husband.

1. All property of the wife owned by her before her marriage, and that acquired by her afterwards by gift, bequest, devise or descent, with the rent, issues and profits thereof, is her separate property.

2. All property of the husband owned by him before marriage, and that acquired by him afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, is his separate property.”

N.R.S. Section 123.180:

“Earnings of wife and minor children, when living separate, separate property of wife. The earnings and accumulations of the wife and of her minor children, living with her or in her custody, while she is living separate from her husband, are the separate property of the wife.”

N.R.S. Section 123.190:

“Earnings of wife appropriated to her use with husband’s consent deemed a gift. When the husband has allowed the wife to appropriate to her

own use her earnings, the same, with the issues and profits thereof, is deemed a gift from him to her, and is, with such issues and profits, her separate property."

N.R.S. Section 123.220:

"Community property defined. All property, other than that stated in NRS 123.130, acquired after marriage by either husband or wife, or both, except as provided in NRS 123.180 and 123.190 is community property."

N.R.S. Section 123.230:

"Husband controls community property. The husband shall have the entire management and control of the community property, with the like absolute power of disposition thereof, except as provided in this chapter, as of his own separate estate; provided:

1. That no deed of conveyance or mortgage of a homestead as now defined by law, regardless of whether a declaration thereof has been filed or not, shall be valid for any purpose whatever unless both the husband and wife execute and acknowledge the same as now provided by law for the conveyance of real property.

2. That the wife shall have the entire management and control of the earnings and accumulations of herself and her minor children living with her, with the like power of disposition thereof, when the earnings and accumulations are used for the care and maintenance of the family."

N.R.S. Section 123.250:

"Death of spouse; ownership of survivor; disposal by will of decedent. Upon the death of

either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of NRS 123.260."

From a reading of the foregoing it is clear that the earnings of appellant involved in this case are community property. The interest of the present wife of the appellant in such community property is a vested interest under the laws of the State of Nevada. *In re Williams Estate*, 161 P. 741, 40 Nev. 241; *Katson v. Katson*, 43 N. Mex. 214, 89 P. 2d 524; *In re Caswell's Estate*, 105 Cal. App. 475, 288 P. 102.

ISSUE II. THE WIFE'S SHARE OF THE INCOME OF APPELLANT FOUND TO BE COMMUNITY PROPERTY SHOULD NOT BE INCLUDED IN THE "NET INCOME" OF APPELLANT AS DEFINED IN THE AGREEMENT OF JULY 13, 1949.

The wife's interest is a vested one at the moment of acquisition of the property. *In re Williams Estate*, 161 P. 741, 40 Nev. 241; *In re Monaghan's Estate*, 60 Ariz. 342, 137 P. 2d 393; *DuPont Company v. Garrison*, 13 Wash. 2d 170, 124 P. 2d 939; *Pendleton v. Brown*, 25 Ariz. 604, 221 P. 213; *Internal Revenue Bulletin*, C.B. 1955-2, pp. 382-383, Rev. Rel. 55-605.

The mere fact the husband has the control and management of the community property in no way detracts from the wife's ownership of this property. *Schramm v. Steele*, 97 Wash. 309, 166 P. 634, 637; *In re Williams Estate*, 40 Nev. 241, 261, 161 P. 741.

Where there is no ambiguity in the instrument the intent of the parties must be determined from what the parties said in the instrument, not from what they had in their minds when signing it. *Williston on Contracts*, Vol. 3, Sec. 310; 17 *C.J.S.* 702; *Frensley v. White*, 208 Okla. 209, 254 P. 2d 982; *Barlow v. Makeeff*, 74 Wyo. 171, 284 P. 2d 1093.

The marital community is in essence a form of partnership wherein the husband is a managing partner, but the ownership rights to the property are community rights. *de Funiak, Community Property*, Vol. 1, p. 265; 11 *Am. Jur.* 179.

Following the foregoing principles it was error for the trial court to interpret the agreement as it did because in so interpreting it it used as a guide property which did not belong to appellant and over which he had no power except as the managing agent of the community partnership. Certainly if his wife had separate property which she gave to him to manage it could not be used as a guide for any agreement he might have entered into with his former wife. The theory of community property law is that the wife, by her efforts as a homemaker in some cases and in other cases by actually bringing home earnings to the community, contributes her share of energy and thought to the progress of the community and therefore is entitled to equal shares in the income and the property acquired therefrom.

If the parties had meant to use Dr. Greear's earnings as the measuring stick without regard to his

earnings going into a partnership or not, they could have said so. At the time of entering into the agreement he was in fact in a partnership where conceivably his earnings could have been much greater than the partnership income either because he worked harder, was better-known as a specialist, or because one of his partners may have been ill and unable to work. Certainly in the event of any of these contingencies the income of the other partner could not have been used either to pay the former Mrs. Greear's alimony or as a measuring device to determine what would be fair for appellant to pay the former Mrs. Greear. Not having referred to his earnings in the previous agreement, it is improper for the appellee here to seek to force alimony payments upon appellant based upon the earnings of appellant without regard to whether it is community or separate property.

Perhaps an example would best illustrate appellant's position. Assume Dr. Greear had not remarried but had entered into a partnership with another doctor where they shared their earnings equally. Assume that the other doctor became so ill he was unable to work so that for some years the earnings of the partnership were solely the earnings of Dr. Greear, but because of the partnership contract he had to continue to put all of his earnings into the partnership income, only one-half of which would be Dr. Greear's net income. Then it would obviously be grossly unfair for his former wife to try and use total partnership income as the "net income" of Dr. Greear. Even if "net income" could be interpreted to mean "earn-

ings'' assuming one-half of his earnings belonged to someone else, as is the case here, it would be very possible that the ridiculous result could obtain that Dr. Greear would not earn enough to even make his payments to his ex-wife.

The only case presented to the trial court touching squarely on the problem here involved is the case of *Alexander v. Alexander*, 64 Fed. Supp. 123 and was on appeal 158 Fed. 2d 429. It is appellant's position here that the dissenting opinion in that case contains the better reasoning. Also that the concurring opinion in that case seems to be based upon the fact that in that case, although the husband was in fact residing in Texas, at the time he executed the agreement the agreement recited he was a resident of Missouri and the concurring Judge therefore concluded that clearly the agreement would have to be interpreted by Missouri law.

The holding in that case, it is submitted, insofar as it is in conflict with appellant's position in this case, is not sound law and should not be followed. The error of the Court in that case, it is submitted, comes from a failure to properly understand the nature of the community property system, and for a correct understanding of this system the Court's attention is invited to 11 *Am. Jur.* 178, 41 *C.J.S.* 986, and *de Funiak, Community Property*, Vol. 1, p. 299.

ISSUE III. THE "USUAL, ORDINARY AND REASONABLE OFFICE EXPENSES" CANNOT BE HELD TO BE LIMITED ONLY TO THE EXPENSES PAID BY THE PARTNERSHIP OF WHICH APPELLANT WAS A MEMBER AT THE TIME THE AGREEMENT WAS SIGNED.

It would seem that citation of authority is not necessary to determine the above proposition.

The words "usual, ordinary and reasonable office expenses" have a fixed meaning in our society today, particularly when read in the over-all context of the agreement which permits the deduction of income tax payments in addition to these expenses. Certainly if the Federal Government would permit the deduction of the expenses referred to in the Statement of Facts, which were disallowed by the trial court, they were directly connected with and incident to his over-all income from which appellee receives her support payments.

The items therein listed are, it is submitted, under the law usual, ordinary and reasonable office expenses and the mere fact that the partnership of which appellant was a member at the time the agreement was signed chose not to have the partnership pay these expenses but rather have each individual pay them has no bearing upon the instant situation because if it were the thought of the parties to limit these expenses to those paid for by the partnership at the time the agreement was entered into they could easily have said so. To hold otherwise would mean that the written agreement is being altered by adding to it something which is not therein written, and furthermore would have to be based upon the claim that the

agreement contemplated that Dr. Greear would remain in the partnership he was then in for the rest of his days. This is neither feasible nor justified by a reading of the agreement.

CONCLUSION.

1. The decision of the trial court insofar as it requires appellant to include community income in computing the monies payable to appellee is in error and judgment should be entered that only appellant's share of the community income should be included in computing these amounts.

2. The items of expenses, to-wit, dues and memberships, entertainment, medical meetings and medical journals, professional insurance, interest, auto expense and depreciation, should be allowed to appellant before any amounts due appellee are computed.

Dated, Reno, Nevada,

November 12, 1958.

Respectfully submitted,

VARGAS, DILLON & BARTLETT,

By JOHN C. BARTLETT,

Attorneys for Appellant.

IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 16,062

JAMES N. GREER, *Appellant*,

v.

MARY SCHAAFF GREER, *Appellee*.

**Appeal from the United States District Court for the
District of Nevada**

BRIEF FOR APPELLEE

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 16,062

JAMES N. GREEAR, *Appellant*,
v.
MARY SCHAAFF GREEAR, *Appellee*.

**Appeal from the United States District Court for the
District of Nevada**

BRIEF FOR APPELLEE

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under Section 1332, Title 28, and this Court has jurisdiction under Section 1291, Title 28, of the United States Code Annotated.

The complaint alleged that plaintiff is a citizen of the District of Columbia, and defendant a citizen of the State of Nevada. (Tr. 3) The judgment appealed from is in the amount of \$39,734.14 plus interest on specified amounts from specified dates and court costs. (Tr. 45-46)

COUNTER-STATEMENT OF THE CASE

Appellant's statement of the case fails to state the crucial facts that when the agreement involved was entered into between the appellant and appellee on July 13, 1949, they were citizens and residents of the District of Columbia, and had been citizens and residents of the District of Columbia for many years. Both of the parties continued to be residents of the District of Columbia for a year thereafter, and the appellee still is a citizen and resident of the District of Columbia. (Tr. 3, 19-20, 31, 39-40, 87-88)

Prior to the action in the United States District Court for the District of Nevada out of which this appeal arose, the appellee filed an action in the Circuit Court of Bath County, State of Virginia, to recover money due and unpaid under the terms and provisions of the agreement involved in this appeal. On February 23, 1955, the Circuit Court of Bath County, State of Virginia, entered a judgment in her favor against the appellant for \$10,357.34 plus interest on certain specified amounts from certain specified dates and court costs in that court. In that action, the Virginia court construed the agreement. Its construction was in accordance with the contentions of the appellant. The United States District Court for the District of Nevada followed the construction of the Virginia court. (Tr. 3, 26, 27, 32-37)

Paragraph 4 of the agreement involved defined "net income" as the appellant's "gross income from all sources of his income, less his usual, ordinary and reasonable office expenses and income tax payments by him for that year * * *" and provided that if the appellant's annual "net income" computed according to that definition of his net income, fell below a specified sum, the monthly payments to the appellee for the *succeeding calendar year* should be affected in the proportions therein specified. (Tr. 10-12)

QUESTIONS INVOLVED

1. The first question presented is not what is stated on page 5 of appellant's brief to be the first issue. There it is stated as follows: Is the income shown in appellee's Exhibits 4 and 5 community property of appellant and his present wife? The District Court correctly stated in its decision,

"* * * It may be here said that the Court is concerned only with a determination of the rights of the parties based upon the Virginia judgment and the property agreement. At this point we do not think community property law enters into the picture. What might be the effect of raising that issue after judgment, and at such time as the plaintiff might attempt to satisfy her judgment, is a problem for another day." (Tr. 38)

The District Court also said,

"* * * It is one of interpretation of paragraph 4 of the agreement. What did the parties intend at the time of the execution of the agreement? Did the agreement as written express the intention of the parties? We think it is clear as to what the parties intended, and further, that the wording of paragraph 4 faithfully recites such intention." (Tr. 35)

2. On page 5 of the brief for appellant, the second issue is stated as follows:

"If it is community property, should the present wife's share be included in determining 'net income' as defined in the agreement of July 13, 1949?"

This question is not presented. As the District Court said,

"Defendant asserts that under the law of the State of Nevada, (N.R.S. 123.220) one-half of his earnings and income vested in his present wife and therefore only one-half of his earnings, medical and otherwise, should be used as the base for computing his net worth. Without going into detailed discussion on this

point, and we concede that there can be much academic argument, we reject defendant's contention on this score. By way of illustrating our thinking we cite *Alexander v. Alexander*, 158 F. 2d 492, and *Hutchison v. Hutchison*, 119 P. 2d 214. It is obvious that at the time of the execution of the separation agreement the parties did not have in contemplation the vagaries of the law of forty-eight states, nor will this Court write them into the agreement even though the argument is made by defendant's counsel that the sacred provisions of the Nevada community property law should be upheld. * * *'' (Tr. 37-38)

3. The brief for appellant states on page 5 that the third issue is as follows:

"Is appellant in fixing 'usual, ordinary and reasonable office expenses' limited to the expenses which were paid by the partnership of which he was a member at the time he signed the agreement?"

This is not the question presented. As the District Court said,

"* * * This difference of opinion between the parties is due to the different interpretations placed by the parties on the expression 'net income' appearing in paragraph 4, and which is therein defined * * *."

"Which computation to accept for the purpose of determining the moneys now due from the defendant to the plaintiff becomes now the problem of the Court. It is one of interpretation of paragraph 4 of the agreement. What did the parties intend at the time of the execution of the agreement? Did the agreement as written express the intention of the parties? We think it is clear as to what the parties intended, and further, that the wording of paragraph 4 faithfully recites such intention." (Tr. 34-35)

ARGUMENT

There are many things in the transcript of record showing that the District Court gave most careful consideration and attention to this case and was fully informed of the facts, recognized very clearly the questions presented and

possessed a thorough knowledge and understanding of the law of the case. In fact, the District Court's handling of this case was most commendable. All of this is shown by the District Court's pretrial order, (Tr. 25-30) the colloquy with counsel for appellant during oral argument of the case, (Tr. 113-128), the District Court's decision, findings of fact, conclusions of law and judgment. (Tr. 30-46)

The judgment of the District Court should be affirmed on each and all of the following three grounds:

1. It is well-settled that contracts are to be governed, as to their nature, their validity and their interpretation, by the law of the place where they were made, unless the contracting parties clearly appear to have had some other law in view. This rule has been applied in a case in point. *Alexander v. Alexander*, 64 F. Supp. 123, affirmed 158 F. 2d 429, cert. denied, 67 S. Ct. 1086, 330 U.S. 845, 91 L. Ed. 1290. In that case, there was a property settlement agreement entered into in Missouri where the parties both resided. After the settlement was executed, a divorce was obtained in Missouri. Instant action was by the wife, then still a resident of Missouri, against the husband, who was then a resident of Texas, in a Kansas Court. The wife had attached property of the husband in Kansas. The settlement provided \$150.00 a month for the maintenance of the wife, and a similar amount for maintenance of the children until maturity, maintenance to the wife to cease upon her death or remarriage. The pertinent part of the settlement provided substantially as follows: That the defendant each year until the wife's death or remarriage would furnish her true copies of his tax returns for the preceding year; and if shown thereby, that the husband should have gross income from any source except capital gain in any calendar year in excess of \$7,500, then for every calendar year, the husband should pay to the wife in twelve (12) equal, consecutive monthly installments

a further sum equal to 20 percent of the amount by which said calendar year income of the defendant exceeds \$7,500 for further support of the wife. In the Federal Supplement opinion, the court filed findings of fact and conclusions of law. The pertinent conclusions of law are as follows:

“5. That the meaning of the term ‘gross income’ as used in the second paragraph of subdivision ‘Six’ of said property settlement agreement is governed by the law of the state where said property settlement agreement was executed and where such agreement was to be performed and by the intent of the parties to said agreement.

“6. The application of the Texas community property law to gross income received in that state and, particularly, as such application may affect the nature of gross income as shown on federal income tax returns by citizens and residents of that state does not control the meaning of the term ‘gross income’ as used in the said property settlement agreement executed in Missouri between parties who were citizens and residents of Missouri at the time of the execution of such agreement and which agreement was to be performed in Missouri.

“7. That the meaning of the term ‘gross income’ as used in the second paragraph of subdivision ‘Six’ of said property settlement agreement and is applicable to the income which is the subject of this action, is synonymous with ‘gross earnings’ as ordinarily and commonly used and is not limited or varied by the application of the Texas community property law to the gross earnings or gross income of the defendant.”

In 158 F. 2d 429, page 431, the court said:

“This being a Missouri contract, it must be presumed that when the parties used the term ‘gross income’ they meant and understood ‘gross income’ as that term is understood in Missouri and under Missouri law. There can be no doubt what appellant’s income was, for instance, in 1943, under the Missouri

law, had he remained in Missouri. Admittedly his income for that year in Missouri was \$14,161.42 of which he would then owe to the appellee 20 percent of the excess of that gross income over \$7,500.00.

“Of course he could go to Texas, but when he went he did not take the contract with him. It remained in Missouri so to speak, a Missouri contract subject to interpretation under that law. His removal to Texas did not change a Missouri contract into a Texas contract. His obligations under the contract still depended upon the law of Missouri the place where the contract was made. When he executed this contract in Missouri, he fixed his liability under the canopy of Missouri law, and he remains thereunder until the performance of the contract is completed.”

Another case in point, in a community property state, is *Hutchison v. Hutchison*, 48 Cal. App. 12, 119 P. 2d 214. Here the parties separated in 1928, the husband conveying the house in trust to his wife for life. The income from the sale or lease of the house was to go to the wife for her support. Until such time as the house produced income, she was to receive \$300 a month from stock which the husband placed in trust. The action was brought in California for construction of the declaration of trust and of the property settlement. Husband alleged duress in the execution of the trust agreement and property settlement. In 119 P. 2d 217, the court said:

“Upon this record the first question for determination is whether the law of California or the law of Illinois is here applicable. It is well established that the legality of a contract is to be determined by the law of the place where it was made and its interpretation likewise. Civil code sec. 1646; Restat., Conflict of Laws, Sec. 347. If the contract is legal in the state where it was made it will be enforced in another state unless the contract is contrary to the strong public policy of the forum. Restat., Conflict of Laws, Sec. 612. As it appears that the declaration of trust and the property settlement agreement were made in Illinois by citizens of Illinois and for aught that ap-

pears the obligations thereof were to be performed there, it is self-evident that the law of Illinois must control as to their validity and interpretation * * *”

The following cases state generally the rule of law governing the construction of contracts:

In *Liverpool and G. W. Steam Co. v. Phenix*, 129 U.S. 397, 453, the court said:

“* * * (This court) has often affirmed and acted on the general rule, that contracts are to be governed, as to their nature, their validity and their interpretation, by the law of the place where they were made, unless the contracting parties clearly appeared to have had some other law in view. *Cox v. United States*, 6 Pep. 172; *Scudder v. Union Bank*, 91 U.S. 406; *Pritchard v. Norton*, 106 U.S. 124; *Lamar v. Micou*, 114 U.S. 218; *Watts v. Camors*, 115 U.S. 353, 362.”

In the following cases, the respective states have community property laws:

In *Bernard Gloeckler Co. v. Baker Co.*, (Texas-1932) 52 S.W. 2d 912, 914, the court said:

“The validity, interpretation, and obligation of contracts depend on the law of the state where the contract originates. *Gautier v. Franklin*, 1 Tex. 732. Judge Wheeler in *Hays v. Cage*, 2 Texas 501, quotes from Chief Justice Shaw in *Bulzer v. Roche*, 11 Pick. (Mass. 32) 22 Am. Dec. 359; *Bank of U. S. v. Donnally*, 8 Pet. 361, 8 L. Ed. 974: ‘The authorities, both from the civil and the common law concur in fixing the rule that the nature, validity and construction of contracts is to be determined by the law of the place where the contract is made; and that all remedies for enforcing such contracts are regulated by the law of the place where such remedies are pursued.’ * * *”

In *Forgan, et al. v. Bainbridge*, 34 Ariz. 408, 274 P. 155, 158, the court said:

“* * * The law as to the validity and interpretation of personal contracts is that of the place where they

were made, the *lex loci contractu*, unless the parties thereto intended they should be governed by the law of some other place. *Bank of Augusta v. Earl*, 13 Pet. 519, 10 L. Ed. 274, *Davis v. G. M. & St. Paul Ry. Co.*, 93 Wis. 470, 57 N.W. 16, 1132, 33 L.R.A. 654, 57 Am. St. Rep. 935; 5 R.C.L. 931. * * *

In *Hayter v. Fulmore*, 66 Cal. App. 2d 554, 152 P. 2d 746, 748, the court said:

“* * * It is the general rule of contracts that the *lex loci contractus*, or the place where the agreement is made, determines the nature, validity and the construction of the instrument, unless it appears therefrom that it is to be performed in another state. * * *

In *Metropolitan Life Insurance Co. v. Haack*, 50 Fed. Supp. 55, 61 (La. 1943), the court said:

“The general rule is that the law of the place where a contract is made or entered into governs with respect to its nature, validity, application, and interpretation. * * *

In *Weber Showcase and Fixture Co. v. Waugh*, 42 F. 2d 515, 519 (Washington, 1930), the court said:

“* * * It is fundamental that a contract is to be interpreted according to the *lex loci contractus*, * * *.”

2. The intention of the parties is shown by the facts and circumstances surrounding the execution of the contract, and their intention is clearly expressed in the language of the contract. The District Court so found. (Tr. 35 and 41-42) Among other things, the District Court found that the contract defined “net income” as “gross income from all sources of his income, less his usual, ordinary and reasonable office expenses and income tax payments for that year * * *.” The District Court also found that the term “usual, ordinary and reasonable office expenses” at the time and place and under the circumstances that the contract was entered into, did not include such items as dues

and memberships, entertainment, medical journals, insurance, interest, depreciation and automobile expense. (Tr. 34-37 and 41-42) These findings by the District Court are supported by the evidence (Tr. 87, 94-95, 105-106 and 133-134)

Rule 52 of the Federal Rules of Civil Procedure provides that “* * * Findings of fact shall not be set aside unless clearly erroneous, * * *”

On the other hand, the appellant's contentions are not supported by the language of the contract or by the evidence.

The appellant, in computing his “net income” did not compute it according to the definition of “net income” contained in the agreement between the parties. Instead, he computed it according to the definition of “net taxable income” under the Federal income tax laws. The contract did not permit the defendant to adopt his own ideas concerning what constitutes his “net income”. The contract defines his “net income.” The definition in the contract is binding on the parties and the Court the same as other terms and provisions of the contract are binding on the parties and the Court.

Similarly, the appellant, in making deductions from his gross income, did not limit them to “office expenses,” as provided in the contract. Under the terms of the contract, expenses allowable as deductions are limited to “office expenses.” No other kind of expense is deductible in determining his “net income.” The contract also limits “office expenses” to “usual, ordinary and reasonable office expenses” within the intention of the appellant and appellee at the time the agreement was entered into. At that time, the appellant was a member of a medical partnership in Washington, D. C., and his office expenses were paid by the partnership. Obviously, the parties referred to those office expenses. Consequently, the question of fact in the

District Court was: What were "usual, ordinary and reasonable office expenses" at the time the agreement was entered into? As hereinbefore shown, the District Court found as a fact from the evidence that they did not include such items as dues and memberships, entertainment, medical journals, insurance, interest, depreciation and automobile expense. (Tr. 35-36)

To be entitled to the additional deductions that he claimed, the appellant was required to show that they were "usual, ordinary and reasonable office expenses" within the meaning of that term at the time the agreement was entered into. The burden of proof to show this was on the defendant. The facts and figures were within his records and knowledge. *United States v. Denver and R. G. R. Co.*, 191 U.S. 84, 48 L. Ed. 106, 24 S. Ct. 33, *Greenleaf v. Birth*, 6 Pet. (U.S.) 302, 8 L. Ed. 406, 20 Am. Jur. 145-146, paragraph 140.

Moreover, the agreement was so framed that the burden of proof was on the defendant to prove that his annual net income fell below \$17,500 in the calendar year preceding the calendar year in which he claimed he was obligated to pay an amount lesser than \$600 per month. The agreement obligates him to pay \$600 per month commencing as of a given date and continuing during the joint lives of the parties. The appellant's promise to pay \$600 per month continues until he comes forward and proves that his annual net income fell below \$17,500 in the calendar year preceding the calendar year in which he claims his obligation to pay the appellee is an amount lesser than \$600 per month.

Furthermore, the pleadings are so framed that the burden of proof was on the appellant to prove that his annual net income fell below \$17,500. See appellant's separate answer and affirmative defense, paragraph II, and 20 Am. Jur. 142, paragraph 137. (Tr. 23-24)

In its decision, the District Court said:

“* * * We feel that our conclusion in this respect is buttressed by the manner in which the term ‘net income’ was anchored into the agreement, it being there defined as ‘gross income from all sources of his income, less his *usual, ordinary and reasonable* office expenses and income tax payments for that year.’ (Italics ours.)” (Tr. 37)

3. The judgment of the Virginia court is *res judicata* as to the question of interpretation of the contract.

The District Court said in its decision,

“* * * We arrive at this conclusion on the theory that the parties entered into the agreement using the Washington practice and procedure as the ‘yardstick.’ Indeed, it does not appear that the defendant contested the application of such ‘yardstick’ in the Virginia suit, but if he did it was disregarded by the Court. Regardless of the partnership practice of deducting only certain limited items it would appear with some logic that in the Virginia action defendant could have advanced the theory that he had certain other deductible items of expense over and above those used in the partnership practice, namely the type of deductions which he now seeks to assert in the present action. * * *” (Tr. 36-37)

In its decision, the District Court said:

“* * * As to plaintiff’s first claim based on the Virginia judgment the defendant admits the same and offers no defense. His time for appeal in Virginia being long since past the matters therein passed upon are *res adjudicata* and binding on this Court. * * *” (Tr. 33-34)

The "SCHEDULE OF COMPUTATIONS OF AMOUNTS" shows on page 3 thereof that the claim on the Virginia judgment included the following amounts:

Principal of Virginia judgment—	\$10,357.34
Interest at 6 percent per annum on each of the amounts itemized in the Virginia judgment from their respective due dates to February 1, 1958—	4,009.80
Cost in the Virginia action—	99.20
Total amount due on Virginia judgment—	<hr/> \$14,466.34

In addition to being *res judicata* as to these amounts involved in the Virginia judgment, that judgment was *res judicata* and binding on the United States District Court for the District of Nevada as to all matters therein passed upon by the Virginia court, including that court's interpretation of the contract. The District Court has followed the Virginia court's interpretation of the contract as to what constitutes the appellant's "net income" and as to what constitutes "usual, ordinary and reasonable office expenses." The District Court also followed the Virginia court's construction that the payments due from the appellant to the appellee for any one year are determined by his net income of the preceding year. (Tr. 34, 35 and 37)

In this connection, it should be observed that at the time of the institution of the Virginia action and during its pendency, the appellant was living in Nevada and was attending a medical meeting in Bath County, Virginia, and was personally served with process in the Virginia action. His present defense was available to him in the Virginia action. (Tr. 31-32 and 40) Consequently, the Virginia judgment would be *res judicata* of his present defense even if he had not raised it in the Virginia action. *Cromwell v. County of Sac*, 94 U.S. 351, 352-353; *Lumber Co. v. Buchtel*, 101 U.S. 638.

CONCLUSION

It is respectfully submitted that judgment of the United States District Court for the District of Nevada should be affirmed.

Respectfully submitted,

JAMES W. JOHNSON, JR.
Attorney for Appellee

No. 16,062

United States Court of Appeals
For the Ninth Circuit

JAMES N. GREER,

Appellant,

VS.

MARY SCHAAF GREER,

Appellee.

Appeal from the United States District Court
for the District of Nevada.

REPLY BRIEF OF APPELLANT.

VARGAS, DILLON & BARTLETT,

ALEX. A. GARROWAY,

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Attorneys for Appellant.

FILED

MAR 25 1959

PAUL P. O'BRIEN, CLERK

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No. 16,062

**United States Court of Appeals
For the Ninth Circuit**

JAMES N. GREER,

Appellant,

VS.

MARY SCHAAF GREER,

Appellee.

**Appeal from the United States District Court
for the District of Nevada.**

REPLY BRIEF OF APPELLANT.

I. STATEMENT OF ADDITIONAL FACTS.

The record does not indicate that the appellant raised the question of the application of the agreement on community property in the Virginia proceedings. It does not even appear that the appellant raised the question involved with reference to usual, ordinary and reasonable office expenses in the Virginia suit.

II. ARGUMENT.

Since appellant and appellee disagree as to the manner of stating the question involved, appellant will discuss the section of appellee's brief designated as

“Questions Involved” in the argument portion of appellant’s reply brief.

Appellant still insists that the trial Court erred in its conclusion that the community property law did not “enter the picture” at this stage of the case. The true question involved is what property can the agreement apply to and appellant contends that it cannot apply to property which belongs to a third person who was not a party to the agreement or to any of the actions involving the agreement. If the parties had intended the agreement to be measured by the personal earnings of appellant as a practicing physician then they could have said so. Had they done this then even in the case of a business partnership, a different measuring device would have been used than is now proper. Not having so agreed, appellee cannot now use the income of a third person in determining what monies should be paid her by appellant. Furthermore, if appellant were receiving income from a new partnership, marital or otherwise, and appellant should become ill so that his personal income was nothing, you can rest assured that appellee would resist any attempts of appellant to try and avoid the application of the agreement to appellant’s share of the partnership income simply because he had nothing to do with earning it.

Although both appellee and the trial Court did state that it was clear as to what the parties intended, here again appellant is before the instant Court because he does not agree with that statement. The agreement is not ambiguous and, therefore, must be in-

terpreted by what it says and the words used therein are binding equally on both parties. It is simply a problem for the Court to interpret what the words used mean under these circumstances.

Appellant will not rehash the argument with reference to the various authorities cited at this time, but will devote the rest of the brief to the claim of appellee that apparently the judgment of the Virginia Court should be *res judicata* as to all questions raised in this proceeding.

In answer to this claim it is appellant's position, first, that *res judicata* is an affirmative defense which should have been pleaded and was not pleaded, and therefore cannot be raised at this time. Rule 8(c) Title 28 USCA.

Secondly, appellant contends that there is nothing on the record to properly bring the question of *res judicata* before this Court. It is true the trial Court, as set forth in appellee's brief, used the term *res judicata* on numerous occasions but nowhere was it stated that the issue with reference to community property was raised and with reference to the expenses the trial Court stated:

"Indeed, it does not appear that defendant contested the application of such 'yardstick' in the Virginia suit, but if he did it was disregarded by the Court." (Tr. 36-37.)

It is submitted that the trial Court in using the words "*res judicata*" did so without having the issue presented to it since it was not pleaded nor argued,

and in fact in paragraph II of his answer the appellant admitted the Virginia judgment. (Tr. 21-22.) Also he admitted the entry of the Virginia judgment at the pre-trial conference. (Tr. 25.) It must have been with these admissions in mind that the trial Court was using the expression "*res judicata*" to indicate simply that there was to be no argument about how much was due from appellant to appellee under the Virginia judgment. For appellee to now claim that the judgment of the Virginia Court is *res judicata* when the question was never presented in the pleadings nor to the trial Court in argument for that matter is grossly unfair to appellant.

Thirdly, the doctrine of *res judicata* could not apply to the instant situation because the facts sued upon by appellee in her second cause of action are different from the facts sued upon in Virginia.

If appellant was so unfortunate as to have failed to assert a right in the Virginia proceeding and thereby the judgment against him was larger than it should have been, it certainly would not be proper to perpetuate the injustice done to him by now stating he cannot now assert all of the defenses which he may have to the instant litigation. If appellant were in any way attacking the Virginia judgment then the question of *res judicata* would be properly before the Court, but since no such attack is made and since there is no affirmative pleading asserting the defense of *res judicata* as to the issue of community property and as to the issue of what are usual, ordinary and

reasonable office expenses, such question is not before this Court nor was it before the District Court.

III. CONCLUSION.

It is respectfully submitted that the judgment of the United States District Court for the District of Nevada should be reversed by modifying the same in the following respects:

1. The trial Court should only include appellant's share of community property in computing monies payable to appellee under their agreement.

2. In computing the amount due from appellant to appellee under said agreement, appellant should be allowed to deduct the expenses set forth in appellant's opening brief from his share of the community income.

Dated, Reno, Nevada,
March 20, 1929.

Respectfully submitted,

VARGAS, DILLON & BARTLETT,

ALEX. A. GARROWAY,

By JOHN C. BARTLETT,

Attorneys for Appellant.

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No. 16063 ✓

United States
Court of Appeals
For the Ninth Circuit

MONOLITH PORTLAND CEMENT COMPANY,
a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UNITED STATES OF AMERICA,

Appellant,

vs.

MONOLITH PORTLAND CEMENT COMPANY,
a Corporation,

Appellee.

Transcript of Record

FILED

JAN - 9 1958

PAUL P. O'BRIEN, CLERK

Appeals from the United States District Court for the
Southern District of California
Central Division

No. 16063

United States
Court of Appeals
For the Ninth Circuit

MONOLITH PORTLAND CEMENT COMPANY,
a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UNITED STATES OF AMERICA,

Appellant,

vs.

MONOLITH PORTLAND CEMENT COMPANY,
a Corporation,

Appellee.

Transcript of Record

Appeals from the United States District Court for the
Southern District of California
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court, Southern
District of California, Central Division

No. 20256—WM

MONOLITH PORTLAND CEMENT COMPANY,
a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA, and R. A.
RIDDELL, DISTRICT DIRECTOR OF IN-
TERNAL REVENUE, LOS ANGELES DIS-
TRICT,

Defendants.

COMPLAINT FOR REFUND OF TAXES PAID

Plaintiff complains of defendants and each of
them, and alleges:

I.

That the above-named United States District
Court has jurisdiction of this cause of action under
and pursuant to Title 28, United States Code, Sec-
tion 1346(a)(1).

II.

That R. A. Riddell resides within the venue of the
Central Division of this Court and is the duly ap-
pointed and acting District Director of Internal
Revenue, Los Angeles District. That during the year
1951 and until January 1, 1953, R. A. Riddell was
the Collector of Internal Revenue for the Sixth Dis-
trict (Los Angeles) of California when, under the
Reorganization Plan of November 26, 1952, he be-

came the Director of Internal Revenue, Los Angeles District, and on July 20, 1953, he became and now is the District [2*] Director of Internal Revenue, Los Angeles District.

III.

That at all times herein mentioned, the plaintiff, Monolith Portland Cement Company, was and now is a corporation duly qualified to conduct and is conducting business in the state of California, with its principal office in the City of Los Angeles, State of California. That the taxes which were assessed and paid as herein alleged were paid to the District Director of Internal Revenue, Los Angeles District, Los Angeles, California.

IV.

That during the entire year 1951, and for years prior thereto, and ever since, plaintiff did engage and is engaged in the business of mining the raw material limestone from a quarry at Monolith, Kern County, California, and transporting this material to its Portland cement producing plant adjacent to the quarry for the application of normal and ordinary treatment processes to produce the commodity Portland cement.

V.

That during the entire year 1951, subparagraph (A)(iii) of Section 114(b)(4) of the Internal Revenue Code of 1939, as amended, allowed a depletion tax allowance of 15 per cent of the gross income from a limestone mine to a taxpayer engag-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

ing in such a mining business, provided the deduction shall not in any case exceed 50 per cent of the net income of the taxpayer (computed without allowances for depletion) from the property. That subparagraph (B) of Section 114(b)(4) defined gross income from the property as follows:

“(B) Definition of gross income from property. As used in this paragraph the term ‘gross income from the property’ means the gross income from mining. The term ‘mining’ as used herein shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products and so much of the transportation [3] of ores or minerals * * * from the points of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto * * *”

VI.

That commencing with and during the entire year of 1951 there was a duly issued Regulation by the Commissioner of Internal Revenue, designated Section 39.23(M)-1, purporting, by its subsections (e)(3), to limit the 15 per cent limestone depletion allowable to plaintiff by a so-called “representative market or field price of the first marketable product resulting from any process or processes (applied to the limestone) minus the costs and proportionate profits attributable to the transportation and the

processes beyond the ordinary treatment processes;” or, in the production of Portland cement, that a so-called representative first marketable product from the limestone mined by plaintiff existed when it had been processed by crushing and grinding it with other materials and water to a slurry form and placed in tanks; and, that processing thereafter, by sintering in a rotary kiln, grinding the resultant sinter called clinker to a fineness comparable to flour which product is then called Portland cement, and sacking for shipping or shipping the ground Portland cement in bulk, was not the application of normal and ordinary treatment processes in obtaining the first marketable product by plaintiff.

VII.

That there was not in the entire year 1951 any market for any of the limestone of the character quarried by plaintiff at its quarry and plant at Monolith, California, except for Portland cement produced in bulk or in sacks.

VIII.

That the normal and ordinary process steps applied for the producing of Portland cement are: First, quarrying and primary crushing the rock; second, secondary crushing and grinding the crushed rock with water and silicon, iron and aluminum elements to obtain a properly proportioned limestone slurry; third, sintering the slurry in a rotary kiln; fourth, grinding [4] the resultant limestone clinker with gypsum to a fineness comparable to ordinary

flour into Portland cement; and fifth, sacking for shipping or shipping the Portland cement in bulk.

IX.

That plaintiff, having before, during, and since 1951, maintained its books and reported its taxes upon a calendar year basis, did cause its officers and agents to make its income tax return for the year 1951, and, as compelled by the regulation alleged in paragraph VI hereof, computed its depletion allowance within the limits of this regulation, resulting in an original assessment of an income tax in the sum of \$384,411.65. That thereafter, and in the year 1953, defendants caused a reassessment to be made of plaintiff's income taxes due for the calendar year 1951 in accordance with their interpretation of this regulation resulting in an additional assessment in the sum of \$3,914.91, or a total assessment for the year 1951 in the sum of \$388,326.56. That the entire assessment has been paid by plaintiff to defendants on the dates hereinafter alleged.

X.

That in June, 1954, in the action *Cherokee Brick & Tile Co. v. United States*, 122 F. Supp. 59, the court adjudicated that the regulation alleged in paragraph VI hereof was ineffective to the extent it went beyond the statute alleged in paragraph V hereof. That thereafter, in January, 1955, the Fifth Court of Appeals affirmed said decision; its decision being reported at 218 F. (2d) 424. The Cherokee case involved the mining of clay and by normal and

ordinary processes converting it to brick. In the action *Hitchcock Corporation v. Townsend*, 132 F. Supp. 785 (M.D.N.C., July, 1955) concerning the mining and processing of talc, the court confirmed the Cherokee decision. The Cherokee decision was again confirmed on June 14, 1956, in the proceeding *Virginia Limestone Corporation*, Docket No. 51766, 26 T.C. No. 68 (Prentice Hall 1956, para. 74430). These adjudications are applicable to and binding upon the parties to this litigation. [5]

XI.

That upon learning of the error of the defendants in their construction of the applicable internal revenue statute, plaintiff, on March 9, 1955, caused a claim under oath by its vice-president for refund to be filed with defendants, upon a form provided by the defendants, being form No. 843, to which form plaintiff caused to be attached, a statement, a true copy thereof being Exhibit A attached hereto and made a part of this complaint. That said claim and its attached statement truly set forth the grounds upon which the refund was claimed, including detailed facts apprising the defendants of the amount and basis of the claim.

XII.

That it is apparent from the recitals of the refund claim as filed by plaintiff that plaintiff has been over assessed pursuant to the regulation alleged in paragraph VI, and contrary to the statute as alleged in paragraph V, in the sum of \$166,811.04,

which over-assessment was paid on the dates hereinafter alleged.

XIII.

That the refund claim filed on March 9, 1955, hereinbefore alleged, has neither been allowed nor disallowed by the defendants and more than six (6) months has elapsed from the time of the filing of said claim. That pursuant to Section 3772 (a) (1) (2) of the Internal Revenue Code, 1939, as amended, and Section 6532 (a) of the Internal Revenue Code of 1954, as amended, plaintiff is entitled to commence this action.

XIV.

That except for the additional assessment in 1953 for \$3,914.91, plaintiff paid its taxes for the year 1951 in quarterly installments in the year 1952, as follows:

(1)	March 15, 1952.....	\$126,000.00
(2)	June 15, 1952,.....	126,000.00
(3)	September 15, 1952.....	74,749.91
(4)	December 15, 1952.....	57,661.74

That the additional assessment of \$3,914.91 made in 1953 was paid on [6] February 12, 1954.

XV.

That plaintiff is entitled by statute, Title 26, U.S.C.A., Section 3771(a)(b)(2) (1939 I.R.C.), to interest at the rate of six per cent (6%) per annum upon the over-assessment of \$166,811.04, hereinbefore alleged, from the dates of its payment. That

payment upon said over-assessment first occurred with the installment payment of June 15, 1952, on which date the total amount of the installments paid first exceeded the total amount of tax due for the year of 1951 by the sum of \$30,484.48. That said six per cent (6%) interest is payable on said \$30,484.48 from June 15, 1952, on the full amount of the third installment from September 15, 1952, on the full amount of the fourth installment from December 15, 1952, and on the full amount of the additional assessment from February 12, 1954.

Wherefore, plaintiff prays judgment against the defendants, and each of them, as follows:

1. That plaintiff be awarded judgment against said defendants in the sum of \$166,811.04, plus interest at the rate of six per cent (6%) per annum from the dates of payment of the principal sum.

2. That such appropriate orders and directions as provided by law be made by the Court for the paying and satisfying of the judgment.

3. For such other and further relief as the Court may deem proper.

ENRIGHT & ELLIOTT,
J. HOWARD SULLIVAN,

By /s/ JOSEPH T. ENRIGHT,
Attorneys for Plaintiff. [7]

EXHIBIT A

Monolith Portland Cement Company

A Statement Attached to and Made Part of Claim
for Refund for the Calendar Year Ended 1951

Taxpayer contends, under the theory set forth in Cherokee Brick and Tile Company v. United States (U.S.D.C.) Middle District of Georgia (June 4, 1954), 1954 P.H. (Par.) 72954, as affirmed by the Court of Appeals for the Fifth Circuit 1955 P.H. (Par.) 72380, that the first marketable production for the purpose of depletion under Section 114(b) (4)(B) of the Internal Revenue Code of 1939 is finished cement. Therefore, in accordance with the decisions in the aforementioned cases additional depletion is claimed resulting in an overpayment of tax as follows:

Gross sales of finished cement	\$8,698,899.50
Less—Royalty	133,340.02
	<hr/>
	\$8,565,559.48
	<hr/>

Expenses:

Direct and indirect expenses.....	\$5,131,983.93
Selling expense	2,091,311.96
General and administrative expense	466,391.65
	<hr/>

Total expense	\$7,689,687.54
	<hr/>

Net income from cement

operations	\$ 875,871.94
	<hr/>

Depletion—limited to 50 per cent

of net income	\$ 437,935.97
	<hr/>

Net income per R.A.R. dated		
September 17, 1953	\$	780,744.09
Depletion per R.A.R.	\$	109,244.28
Depletion as revised	437,935.97	(328,691.69)
	<hr/>	<hr/>
Revised net income	\$	452,052.40
	<hr/>	<hr/>
Tax per R.A.R. (alternative)	\$	388,326.56
Tax as revised (alternative)		
Statement Attached		221,515.52
	<hr/>	<hr/>
Overpayment	\$	166,811.04
	<hr/>	<hr/>

Monolith Portland Cement Company

A Statement Attached to and Made Part of Claim for Refund for the Calendar Year Ended 1951

Alternative Tax:

Revised net income after depletion allowance based on Cherokee Brick and Tile Company case.....	\$452,052.40
Less—Capital gains	8,785.16
	<hr/>
Surtax net income for alternative tax.....	\$443,267.24
	<hr/>
Surtax 50.75% \times \$443,267.24 = \$224,958.12	
less \$5,500.00 =	\$219,458.12
Capital gains tax 25% \times \$8,785.16.....	2,196.29
	<hr/>
Revised tax	\$221,654.41
Normal tax adjustment for partially tax exempt interest	138.89
	<hr/>
	\$221,515.52
	<hr/>

Monolith Portland Cement Company

A Statement Attached to and Made Part of Claim
for Refund for the Calendar Year Ended 1951

The foregoing claim for refund was prepared by the undersigned or under their direction. The facts stated therein were obtained from the taxpayer's records and other sources considered to be reliable and are believed to be true and correct.

/s/ J. W. VAN GORKOM,

Attorney.

ARTHUR ANDERSEN & CO.

Duly verified.

[Endorsed]: Filed July 27, 1956. [10]

[Title of District Court and Cause.]

ANSWER

Comes now the United States and R. A. Riddell, District Director of Internal Revenue, by its and his attorney, Laughlin E. Waters, United States Attorney for the Southern District of California, and answer the allegations of the complaint as follows:

1. Admit the allegations of paragraph I of the complaint.
2. Admit the allegations of paragraph II of the complaint.
3. Admit the allegations of paragraph III of the complaint.

4. Deny the allegations of paragraph IV of the complaint, except admits that during the year 1951, and for years prior thereto, and since, plaintiff did engage and is engaged in the business of mining limestone from a quarry at Monolith, Kern County, California, and transporting this material to its Portland cement manufacturing plant adjacent to the quarry.

5. Deny the allegations of paragraph V of the complaint. [12]

6. Deny the allegations of paragraph VI of the complaint.

7. Deny the allegations of paragraph VII of the complaint.

8. Defendants are without sufficient knowledge or information to admit to the truth of the allegations contained in paragraph VIII of the complaint.

9. Deny the allegations of paragraph IX of the complaint, except admit that plaintiff, having before, during and since 1951, maintained its books and reported its taxes upon a calendar year basis, did cause its officers and agents to make its income tax return for the year 1951, and computed its depletion allowance, resulting in an income tax liability of \$384,794.14; and that thereafter, and in the year 1953, defendants determined a deficiency on plaintiff's income taxes due for the calendar year 1951 and made an additional assessment of \$3,914.91, or a total tax liability for the year 1951 in the sum of \$388,709.05.

10. Deny the allegations of paragraph X of the complaint for the reason that it states conclusions of law.

11. Deny the allegations of paragraph XI of the complaint, except admits that plaintiff on March 9, 1955, caused a claim for refund to be filed with the defendants to which plaintiff caused to be attached a statement, a true copy thereof being Exhibit A attached to the complaint, and that said claim and attached statement set forth the grounds upon which the refund was claimed, except it is not intended to admit any of the allegations contained in said claim for refund or attached statement not expressly admitted elsewhere in this answer.

12. Deny the allegations contained in paragraph XII of the complaint.

13. Admit the allegations contained in paragraph XIII of the complaint.

14. Deny the allegations contained in paragraph XIV of the complaint except admit that plaintiff paid its taxes for the year 1951 in quarterly installments in the year 1952, as follows:

(1)	March 17, 1952.....	\$126,000.00
(2)	June 13, 1952.....	126,000.00
(3)	September 16, 1952.....	75,262.55
(4)	December 15, 1952.....	57,531.59

An additional assessment of \$3,914.91, made in 1953, was paid on February 15, 1954.

15. Deny the allegations contained in paragraph XV of the complaint except admits that if plaintiff is entitled to recover in this suit, which defendants expressly deny, plaintiff is entitled to interest at the rate of 6 per cent per annum as provided by law.

Wherefore, defendants demand judgment in its favor with allowable costs.

.....

United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

JOHN G. MESSER,
Assistant United States
Attorney;

/s/ JOHN G. MESSER,
Attorneys for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 1, 1956. [14]

[Title of District Court and Cause.]

STIPULATION OF FACTS No. 1

It is stipulated and agreed between the parties by their respective attorneys of record that for the purposes of this cause the following facts shall be taken

as true, subject to objection as to relevancy only by either party, and neither party is to be precluded from adducing additional evidence or testimony at the trial:

I.

The above-named United States District Court has jurisdiction of this cause of action.

II.

R. A. Riddell resides within the venue of the Central Division of this [78] Court and is the duly appointed and acting District Director of Internal Revenue, Los Angeles District. During the year 1951, and until January 1, 1953, R. A. Riddell was the Collector of Internal Revenue for the Sixth District (Los Angeles) of California when, under the Reorganization Plan of November 26, 1952, he became the Director of Internal Revenue, Los Angeles District; and, on July 20, 1953, he became and ever since has been, and now is the District Director of Internal Revenue, Los Angeles District.

III.

During all times herein mentioned, the plaintiff, Monolith Portland Cement Company, a Nevada corporation, was and now is a corporation duly qualified to conduct and is conducting business in the State of California, with its principal office in the City of Los Angeles, State of California. That the taxes which were assessed and paid as herein alleged were paid to the District Director of Internal

Revenue, Los Angeles District, Los Angeles, California.

IV.

A. During all of the year 1951 plaintiff mined a calcium carbonate rock generally known as "limestone."

B. For the purposes of this Stipulation of Facts No. 1, the manufacture or production of Portland cement has been divided into the following two divisions. First, those operations listed in Paragraph VIII of this Stipulation of Facts No. 1 are for the preparation and physical proportioning of the raw materials, and, secondly, those listed in Paragraph IX of this Stipulation of Facts No. 1 are for the calcination or heating of the properly proportioned raw materials in a rotary kiln. The calcination or heat treatment causes chemical reactions which result in the formation of new compounds between principal raw materials of limestone, clay and iron cinders. The new compounds are primarily tricalcium silicate, dicalcium silicate, tricalcium aluminate and tetracalcium alumino-ferrite. The mixture of new compounds comes from the kiln in the form of a clinker which is then finely ground with a small amount of gypsum to obtain Portland cement. [79]

V.

The tons of raw materials produced and used (including withdrawals from inventory) by plaintiff and the tons of raw materials purchased and used

(including withdrawals from inventory) by plaintiff in the year 1951 are as follows:¹

	Produced	Used
Limestone	769,946 tons	771,254
Clay #1	93,425 tons	95,102
Clay #2	21,270 tons	21,659
Tufa	9,237 tons	9,223
Gypsum	22,310 tons	23,393
<hr/>		
Total	916,188	920,631
	Purchased	Used
Iron Cinders	11,916 tons	7,563
Fluorspar	90 tons	98
<hr/>		
Total	12,006	7,661
<hr/>		
Total Raw Materials..	928,194	928,292

VI.

The actual computed average chemical analyses of the raw materials produced by plaintiff during the year 1951, all mined within 50 miles of its cement plant except gypsum which is more than 50 miles (approximately 120 miles), are as follows:

Analysis ²	Limestone	Clay #1	Clay #2	Gypsum
SiO ₂	9.29	55.90	74.60	
Al ₂ O ₃	2.59	14.96	10.19	
Fe ₂ O ₃	0.75	6.94	4.74	
CaO	48.26	8.39	3.36	
MgO	0.68	4.35	0.78	
Loss	38.00	7.27	5.14	
ALK.asNa ₂ O	0.19	2.07	0.99	
CaCO ₃	85.20 ³			
Acid Insoluble				7.40
SO ₃				(41.60)
Gypsum				84.90

¹Each raw material listed is identified by the name used by plaintiff in keeping its raw materials production records, except that "Clay No. 2" is identified as "silica" in said raw materials productions records. [80]

- (2) SiO_2 =1 atom of silicon and 2 atoms of oxygen which is silica or silicon oxide.

Al_2O_3 =2 atoms of aluminum and 3 atoms of oxygen which is alumina.

Fe_2O_3 =2 atoms of iron and 3 atoms of oxygen which is iron oxide.

CaO =1 atom of calcium and 1 atom of oxygen which is calcium oxide.

MgO =1 atom of magnesium and 1 atom of oxygen which is magnesium oxide.

Loss=weight lost as the raw material is heated (primarily carbon dioxide).

ALK. as Na_2O ; Alk=Alkali; Na_2O =2 atoms of sodium and 1 atom of oxygen which is sodium oxide called alkali.

CaCO_3 =1 atom of calcium, 1 atom of carbon and 3 atoms of oxygen which is calcium carbonate.

SO_3 =1 atom of sulphur and 3 atoms of oxygen which is sulphur trioxide.

- (3) This percentage primarily equals the CaO of 48.26 and the loss of 38.00, the difference due to instrument variations. [81]

VII.

The actual computed average high and low, approximately weekly, chemical analyses of the raw materials produced by plaintiff during the year 1951, are as follows:

analysis ⁴	Limestone		Clay #1		Clay #2		Gypsum	
	High	Low	High	Low	High	Low	High	Low
O ₂	10.89	8.11	57.03	55.05	79.07	69.69		
1 ₂ O ₃	3.09	2.25	15.46	14.08	12.48	8.11		
e ₂ O ₃	0.95	0.62	7.37	6.51	5.54	3.86		
aO	49.23	47.05	9.04	7.81	4.49	2.23		
gO	0.84	0.46	4.66	4.00	1.07	0.49		
oss	38.74	37.13	8.11	6.38	6.55	4.08		
LK. as Na ₂ O	0.25	0.14	2.40	1.74	1.41	0.83		
aCO ₃	87.68 ⁵	82.45 ⁵						
acid Insoluble							8.90	5.70
O ₃							(42.28)	(40.00)
ypsum							88.10	82.90

VIII.

The parties to this action agree that the extraction and processing operations set forth below for the mining of the calcium carbonate rock generally known as "limestone" are includable in determining gross income from mining under Section 114 (b) of the Internal Revenue Code of 1939, as amended, and were employed by plaintiff at its quarry and cement plant at Monolith, California, during the year 1951 in order to obtain various types of Portland cement.

A. Drilling and primary blasting from the face of the quarry by the open pit method to obtain the limestone rock.

B. Secondary or squib blasting to further break the limestone rock into manageable size.

(4) See footnote (2) *supra*, on page 4.

(5) See footnote (3) *supra*, on page 4. [82]

C. Loading by shovels into dump trucks which carry the limestone rock to an inclined chute where it is deposited into dump rail cars for transportation to the primary crusher.

D. The dump rail cars deposit the limestone rock into a large primary crusher, which reduces the size of the extracted rock to pieces with a maximum dimension of about six inches.

E. After primary crushing, the crushed limestone falls onto a conveyor which takes it to a secondary crusher for further reduction in size.

F. After secondary crushing, the oversize limestone pieces are screen-separated from the remainder and returned for further crushing; the remainder is ball-milled for size reduction and then conveyed to bunkers for transfer to rail cars for transportation to the cement plant less than two miles away.

G. The dump rail cars deposit the limestone on a conveyor belt which takes it to either a raw storage pile or to a limestone hopper. The raw storage pile is used to replenish the limestone hopper supply.

H. The limestone from its hopper is then blended with clay #1 from another hopper, with clay #2 from another hopper and with iron cinders from another hopper by measuring and conveying equipment.

I. The above blended materials are then gravity-fed into another ball mill in which water is added simultaneously in an amount equal to approximately

36% of the weight of the dry raw materials, where it is ground to a proper fineness known as a "slurry."

J. The slurry from the ball mill is conveyed to tube mills for further grinding.

K. The slurry is next conveyed to a wet slurry tank where it is kept in suspension and blended by a revolving paddle mechanism, and after blending it is fed into a kiln.

IX.

The parties are in disagreement as to further operations being includable in the computation of plaintiff's gross income from mining. Defendant contends the "ordinary treatment processes" normally applied by mine owners [83] and operators to limestone have ceased under the percentage depletion provisions of Section 114 (b) of the Internal Revenue Code of 1939, as amended. Plaintiff contends that the following are also "ordinary treatment processes" normally applied by mine owners and operators in order to obtain any of the various types of Portland cement from limestone, and that they are properly includable in the computation of plaintiff's gross income from mining.

A. The kiln feed slurry is run into the upper end of rotary kilns, which are in the form of long rotating cylinders set at a slight inclination. The feed travels gradually toward the lower end. Hot gases from a flame at the lower end evaporate the water from the slurry, and the application of heat

at a proper temperature chemically combines the remaining material to a dense "clinker."

B. The clinker is conveyed to a grinding mill where gypsum is added, and these are ground to a great fineness to become one of the various types of Portland cement.

C. The cement is placed in silos from which it is loaded and shipped in bags or in bulk.

X.

The parties agree that the processes listed in both Paragraph VIII and Paragraph IX of this Stipulation of Facts No. 1 are the usual and customary process steps applied in the cement industry to obtain any of the various types of Portland cement.

XI.

The plaintiff, during the tax year 1951, maintained its books on the accrual basis and reported its taxes upon a calendar year basis. The plaintiff timely filed its income tax return for the year 1951, and, based upon the Regulations of the Commissioner of Internal Revenue, computed its depletion deduction, resulting in a reported income tax liability, as shown on said return, in the sum of \$384,411.65, plus an interest liability in the sum of \$382.49. Thereafter, in the year 1953, defendant caused the said return to be audited, and assessed a deficiency in tax against plaintiff in the sum of \$3,914.91, plus interest in the sum of \$367.79. The above [84] taxes, deficiency and interest were paid by plaintiff on the following dates and in the following amounts:

March 17, 1952	\$126,000.00
June 13, 1952	126,000.00
September 16, 1952	75,262.55
December 15, 1952	57,531.59
February 15, 1954	4,282.70

XII.

Plaintiff on March 9, 1955, duly filed a claim for refund with defendant setting forth the grounds upon which the refund was claimed and upon which this suit is brought.

XIII.

The defendant neither allowed nor disallowed plaintiff's claim for refund and more than six (6) months elapsed from the time of filing said claim for refund to the time of filing this suit.

XIV.

No part of the sum claimed by plaintiff has been credited, remitted, refunded or repaid to the plaintiff or to anyone on its account. Based upon the decision of this Court the taxes in question shall be recomputed and judgment entered thereon with interest as provided by law.

XV.

The parties agree (a) that plaintiff's gross income from the sale of the various types of Portland cement, including its containers, during the tax year 1951 was \$8,565,559.48; and (b) that plaintiff's net income for the purpose of computing percentage depletion during the tax year 1951 was \$875,871.94.

XVI.

It requires approximately one (1) ton of limestone to produce three (3) barrels of Portland cement from plaintiff's raw materials.

XVII.

The parties agree that the only product sold by plaintiff during the tax year 1951 as a result of its limestone mining operations was Portland [85] cement.

XVIII.

Subject only to an objection as to relevancy as set forth in the preamble of this Stipulation of Facts No. 1 the following documents or photostatic copies thereof may be submitted to the court at the pretrial, the hearing of any motion or at the trial of this action.

A. Exhibit No. 1: Plaintiff's 1951 United States Corporation Income Tax return, dated September 15, 1952, including all exhibits and documents attached thereto.

B. Exhibit No. 2: Revenue Agents' Report dated September 17, 1953, and R. A. Riddell's Form 892 letter dated November 12, 1953, to which it is attached, and including all exhibits and documents attached to said report.

C. Exhibit No. 3: Form 870-Waiver of Restrictions received by the Internal Revenue Service, Los Angeles District, on September 9, 1953.

D. Exhibit No. 4: Subject to an objection as to its relevancy or materiality only, the Revenue Agents' Report dated June 1, 1956, and R. A. Riddell's Form 1203 letter dated July 27, 1956, to which it is attached, and including all exhibits and documents attached to said report.

Executed This 3rd day of December, 1956.

/s/ JOHN G. MESSER.

ENRIGHT & ELLIOTT,

By /s/ JOSEPH T. ENRIGHT.

[Identified as Plaintiff's Exhibit No. 1.]

[Endorsed]: Filed December 3, 1956. [86]

[Title of District Court and Cause.]

STIPULATION OF FACTS No. 2

It is stipulated and agreed between the parties by their respective attorneys of record that for the purposes of this cause the following facts shall be taken as true, subject to objection as to relevancy only by either party, and neither party is to be precluded from adducing additional evidence or testimony at the trial:

1.

The name limestone is applied generally to any rocks which consist essentially of calcium carbonate

or calcium magnesium carbonate or mixtures of these two compounds.

2.

A graphical presentation of limestones would divide them as follows: [189]

Limestones

Limestone—high in calcium carbonate (CaCO_3) and low in magnesium carbonate (MgCO_3);

Magnesium (magnesian) limestone—amounts of calcium carbonate (CaCO_3) and magnesium carbonate (MgCO_3) intermediate between limestone and dolomite;

Dolomite—high in magnesium carbonate (MgCO_3) with a possible maximum content of 46 per cent.

3.

Pure limestone consists of carbonate of lime (CaCO_3) but such material is rarely found except in the form of crystalline calcite, which has a specific gravity of about 2.7 and hardness about 3.

4.

Commercially exploited deposits of limestone (generally) contain variable amounts of iron oxide, alumina, magnesia, silica, phosphorus and sulphur. The content of lime (CaO) may vary between 22 and 56 per cent, magnesia (MgO) from 0 to 21 per cent, alumina (Al_2O_3) is usually fairly low but some limestones may carry over 5 per cent. Iron oxides

rarely exceed 3 or 4 per cent. Silica may be present either in the form of quartz or as a constituent of clay.

5.

Limestone deposits occur widely in the United States and because of its important physical and chemical characteristics it is used more extensively than any other form of rock.

6.

The United States Bureau of Mines, Minerals Yearbook, 1952 and 1953, chapter on "Stone," Table 34, Exhibits A and B of this stipulation, report "Limestone sold or used for all purposes [190] in the United States," as follows:

	1950	In Short Tons		1953
		1951	1952	
estone	180,919,000	205,480,000	217,255,000	224,714,000
land and				
tural cement	59,361,000	64,284,000	64,305,000	66,251,000
e	14,980,000	16,511,000	16,146,000	19,348,000
tal	255,260,000	286,275,000	297,706,000	310,313,000

7.

The United States Bureau of Mines, Minerals Yearbook, 1951, chapter on "Stone," (including limestone), Table 5, Exhibit C of this stipulation, reports "Dimension stone sold or used by producers in the United States in 1951" and Table 30 of Exhibit A reports "Limestone (crushed and broken stone) sold or used by producers in the United States in 1951," as follows:

Use	1951		1952	
	Short tons	Value	Short tons	Value
Other uses ⁴	1,395,343	2,201,926	995,452	1,562,9
Use unspecified	806,509	1,034,891	1,140,872	1,568,5
Total	20,438,880	\$38,702,831	19,328,515	\$38,884,8

10.

The United States Bureau of Mines, Minerals Yearbook, 1952, chapter on "Stone," Table 33 of Exhibit A reports "Sales of fluxing limestone 1943-47 (average) and 1948-52, by uses" as follows:

Year	Blast furnaces		Open-hearth plants	
	Short tons	Value	Short tons	Value
1943-47 (average)	23,239,006	\$18,531,329	5,611,730	\$4,928,601
1948	26,339,790	24,721,052	7,873,410	8,695,137
1949	23,768,970	24,127,897	5,922,020	6,929,134
1950	28,397,710	29,222,700	6,936,900	7,948,041
1951	32,007,284	35,941,217	6,784,102	8,279,021
1952	28,158,299	32,857,562	5,629,204	6,879,035

	Other smelters ¹		Other metallurgical ²		Total	
	Short tons	Value	Short tons	Value	Short tons	Value
1943-47 (av.)	538,796	\$ 540,831	214,174	\$237,610	29,603,706	\$24,238,1
1948	503,490	609,354	185,250	224,465	34,901,940	34,250,1
1949	728,960	835,962	332,370	374,649	30,752,320	32,267,2
1950	457,630	587,643	177,580	174,004	35,969,820	37,932,8
1951	842,877	992,651	295,694	409,236	39,929,957	45,622,2
1952	926,063	1,142,894	195,249	239,860	34,908,815	41,119,5

¹Includes flux for copper, gold, lead, zinc, and unspecified smelters.

²Includes flux for foundries and for cupola and electric furnaces.

⁴Includes stone for acid neutralization, athletic-field marking, carbon dioxide, chemicals (unspecified), concrete blocks and pipes, dyes, fill material, light bulbs, motion-picture snow, oil-well drilling, patching plaster, rayons, roofing granules, spalls, and water treatment.

11.

The United States Bureau of Mines, Minerals Yearbook, 151 chapter upon cement reported 249.5 million barrels (376 pounds) were produced in the United States in 1951. The average net mill realization was \$2.54 per barrel of 376 pounds. (p. 242.) There were 155 producing plants. (p. 244.) “* * * output in California was again considerably higher reaching nearly 30 million barrels in 1951.” Table 2, p. 246, reports 29,918,293 barrels were produced in California in 1951. The Bureau classified the nationwide use of raw materials in the production of Portland cement and the percentages used as follows:

- (a) “Limestone and clay or shale” 69%(2)
- (b) “Cement rock and pure limestone” 20%
- (c) “Blast furnace slag and limestone” 10%
- (d) “Marl and clay” 1%

((2) includes 7 plants using oystershells and clay.)

12.

The Cal. Division of Mines, Journal of Mines and Geology, Vol. 43, No. 3, July, 1947, reports p. 188:

“Portland cement consumes more limestone than all other uses in California. All of it so used is ‘captive’ tonnage, and no state statistics have been published giving the tonnage or value. However, the record of cement production may be used to arrive at an approximate annual figure for limestone used for cement. In 1943 the total Portland cement production in California was 18,515,085

barrels of 376 pounds each or 3,480,279 short tons. If it is assumed that the average lime content of all Portland cement made in the state is 65 per cent, and that all limestone so used will average 90 per cent CaCO_3 , the [196] total consumption of limestone for this purpose was about 4,488,000 short tons. Of course there are several varieties of cement made in which the analysis may vary from that of general-use, moderate heat cement, but it is believed this estimate is not more than 10 per cent in error."

13.

The Cal. Division of Mines, Mineral Information Service, Vol. 8, No. 2, of February 1, 1955, is the only presently located report on cement by that agency. It reports 8,932,829 short tons of lime materials used for manufacturing 32,239,000 barrels of cement in the year 1953. (pp. 4-5.)

14.

For some of the important chemical uses the following specifications for limestone are generally recognized:

(a) U. S. Bureau of Standards, Circular No. 207 (1925), on the recommended specifications for limestone, lime powder and hydrated lime for use in the manufacture of sugar:

	Sugar-soluble lime, (min.) Percent	MgO (max.) Percent	Loss on ignition (max.) Percent
Limestone for the Steffen process.....	90	3	----
Limestone for other processes.....	85	3	----
Quicklime for the Steffen process....	90	3	2
Quicklime for other processes.....	85	3	5
Lime powder	90	3	2
Hydrated limes	86	3	----

Silica is objectionable in limestone for making lime for use in sugar manufacture as it may become colloidal in the juices, forms films on the crystals, and retard their growth.

(b) U. S. Bureau of Standards Circular No. 118 (1921), for the recommended specifications for limestone and lime in the manufacture of glass: [197]

	Class 1		Class 2		Class 3	
	Max.	Min.	Max.	Min.	Max.	Min.
	Percent		Percent		Percent	
Lime and magnesia,						
CaO plus MgO .....	....	94	....	91	....	83
Iron oxide, Fe ₂ O ₃	0.2	....	1.0	....	1.0	....
Alumina, Al ₂ O ₃	3.0	....	5.0	....	5.0	....
Sulphur plus phosphorus,						
SO ₃ plus P ₂ O ₃	1.0	....	1.0	....	1.0	....
Silica, SiO ₂	4.0	....	9.0	....	17.0	....

(c) U. S. Bureau of Mines Information Circular No. 7402 (1947), for the recommended specifications for limestone in the manufacture of calcium carbide (acetylene gas):

Limestone Content	Per Cent
Limestone—Very pure, high-calcium	
Phosphorus, P	(max.) 0.01
Magnesia, MgO	(max.) 0.5
Combined Alumina and Iron	
oxide, Al ₂ O ₃ plus Fe ₂ O ₃	(max.) 0.5
Silica, SiO ₂	(max.) 1.2
Sulphur, S	(max.) a trace

(d) A State Geological Survey of Illinois Title "A Summary of the Uses of Limestone and Dolomite" (1938), summarizes the recommended specifications for limestone for the following uses:

(1) Alkalies

Limestone Content	Per Cent
Calcium carbonate, CaCO_3	90-99
Combined Iron oxide, Alumina and Silica, Fe_2O_3 plus Al_2O_3 plus SiO_2	0- 3
Magnesium carbonate, MgCO_3	0- 6

Alternative specifications of some manufacturers are suggested as follows:

Limestone Content	Per Cent
Calcium carbonate, CaCO_3	(min.) 93
Magnesium carbonate, MgCO_3	3- 5
Silica, SiO_2	3

(Most U. S. manufacturers do not want Silica in excess of 1%.)

(2) Aluminum Oxide

Limestone Content	Per Cent
Calcium carbonate, CaCO_3	(min.) 97
Silica, SiO_2	(max.) 1

(3) Ammonia

No specifications for limestone.

(4) Baking powders

High calcium limestone recommended.

(5) Calcium nitrate

High calcium limestone recommended.

(6) Explosives

Rather pure calcium carbonate limestone to marble dust containing as much magnesium as calcium. Impurities in limestone are of no practical importance.

(7) Fertilizers

High calcium carbonate probably desirable. For use as Filler, in fertilizer manufacture, a reasonably pure limestone is recommended. [199]

(8) Blast-furnace flux (Bessemer)

Limestone Content	Per Cent
Calcium carbonate, CaCO_3	(min.) 90-95
Combined Silica and Alumina	
SiO_2 plus Al_2O_3	(min.) 3- 5
Alumina, Al_2O_3	(max.) 2
Combined Sulphur and phosphorus, S plus P	(max.) 0.1
Phosphorus for "Bessemer Iron".	(max.) 0.01

(9) Open-Hearth Steel Flux

Limestone Content	Per Cent
Magnesium carbonate, MgCO_3 ..	10 (MgO-5%)
Alumina, Al_2O_3	(max.) 1.5
Silica	1
Combined Phosphorus and Sulphur, P plus S	low

(10) Non-Ferrous Metal Flux

High calcium limestone commonly used as flux in smelting copper, nickel, lead, zinc, gold, silver, antimony and other metals.

(11) Mineral feed stock

Limestone Content	Per Cent
Calcium carbonate, CaCO_3	(min.) 95
Flourine	none

(12) Paper (Tower System)

Limestone Content	Per Cent
Calcium carbonate, CaCO_3	(min.) 95
Magnesium carbonate, MgCO_3	(max.) 2.5
Combined impurities	(max.) 2.5
Mica, graphite flakes, carbonaceous material and pyrite	undesirable

(Sulphite System)

Limestone Content (Lime Equivalent)

	Per Cent
Calcium oxide, CaO	(min.) 53
Magnesium oxide, MgO	(max.) 1.5
Oxides of silicon, iron and aluminum (max.)	1.5
Organic matter	(max.) 0.5

(13) Phenol

High calcium limestone recommended with magnesia, iron oxide and alkali as low as possible.

(14) Poultry grit

High calcium limestone recommended with fluorine not in excess of 0.1 per cent.

15.

The California State Division of Mines Bulletin No. 176, dated October, 1956, reports in a table "Specifications for Limestone and Dolomite and Lime for the Principal Consuming Industries," being Exhibit D of this stipulation.

16.

The United States Bureau of Mines Information Circular No. 7402, dated May, 1947, summarizes the physical and chemical specifications for the various industrial uses of limestones and dolomite, except for cement manufacturing, an important well-known use, being Exhibit E of this stipulation.

17.

The United States Bureau of Mines Information Circular No. 7738, dated March, 1956, summarizes the Limestone and Dolomite industry operations, uses, distribution of deposits, and area marketing conditions, being Exhibit F of this stipulation.

18.

The California State Division of Mines Bulletin No. 176, dated October, 1956, reports upon Limestones, Dolomite and Lime [201] Products, being Exhibit G of this stipulation.

19.

Defendant is to furnish to plaintiff the circulars, identified in subparagraphs (a), (b), (c) and (d) of paragraph 14 of this stipulation, and plaintiff

reserves the right to verify the accuracy of these specifications.

Dated: February 13, 1957.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States At-
torney, Chief, Tax Division;

JOHN G. MESSER,
Assistant United States At-
torney,

/s/ JOHN G. MESSER,
Attorneys for Defendants, United States of Amer-
ica, and Robert A. Riddell.

ENRIGHT & ELLIOTT,
J. HOWARD SULLIVAN,

/s/ JOSEPH T. ENRIGHT,
Attorneys for Plaintiff, Monolith Portland Cement
Company.

[Identified as Plaintiff's Exhibit No. 8.]

[Endorsed]: Filed February 15, 1957. [202]

[Title of District Court and Cause.]

STIPULATION OF FACTS No. 3

It Is Stipulated and Agreed between the parties
by their respective attorneys of record that for the

purposes of this cause the following facts shall be taken as true, subject to objection as to relevancy only by either party, and neither party is to be precluded from adducing additional evidence or testimony at the trial or before submission of this cause to the Court:

I.

During the year 1951, a total of 94,966 short tons of "clinker" (as defined in Paragraph IX, subparagraphs A and B, of Stipulation of Facts No. 1 heretofore entered into by the parties) were sold by two cement manufacturing companies to a company which sells various building materials in the Los Angeles [382] area. Said company added gypsum to the purchased "clinker" and ground it to the required fineness to become one of the various types of Portland cement which it sold.

Plaintiff was not one of the cement companies which sold said "clinker."

II.

There were approximately 364 pounds to a barrel of "clinker" which was sold in 1951 for \$1.8773 per barrel, resulting in a price of \$10.31 per short ton of "clinker." The dollar value of said "clinker" sold in the year 1951 was, therefore, \$979,099.46 (94.966 x \$10.31).

III.

The two cement companies, which sold the "clinker" above set forth, owned stock in the company which purchased and ground said "clinker" into cement. Also, the presidents of the cement com-

panies which sold the "clinker" are directors of the company which purchased the "clinker."

Dated: July 11, 1957.

ENRIGHT & ELLIOTT,

By /s/ JOSEPH T. ENRIGHT,
Attorneys for Plaintiff, Monolith Portland Cement
Company.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States At-
torney, Chief, Tax Division;

JOHN G. MESSER,
Assistant United States At-
torney,

/s/ JOHN G. MESSER,
Attorneys for Defendants, United States of Amer-
ica and Robert A. Riddell.

[Identified as Plaintiff's Exhibit No. 19.]

[Endorsed]: Filed July 11, 1957. [383]

[Title of District Court and Cause.]

MINUTES OF THE COURT
AUGUST 2, 1957

Present: Hon. Wm. C. Mathes, District Judge.

Counsel for Plaintiff: Joseph T. Enright.

Counsel for Defendant: John G. Messer,
Asst. U. S. Attorney.

Proceedings: Trial.

Plaintiff's Exhibits 1 through 23 are received in evidence.

Plaintiff rests.

Government rests.

Court Orders cause continued to October 28, 1957,
1:30 p.m. for oral argument.

JOHN A. CHILDRESS,
Clerk;

By /s/ P. D. HOOSER,
Deputy Clerk. [385]

[Title of District Court and Cause.]

SUPPLEMENT TO COMPLAINT
FOR REFUND OF TAXES PAID

Plaintiff further complains of defendants and each of them, and alleges:

I.

That since the parties hereto rested their respective cases, a dispute has arisen between them as to the proper method of accounting to be used in computing the tax refund due the plaintiff.

II.

That the dispute relates to the accounting for the exclusion, for percentage depletion purposes, of the process or operation followed by plaintiff in packing and loading a portion of its finished cement in bags or sacks. [392]

III.

That on December 20, 1957, plaintiff offered in writing to make settlement of the dispute as follows:

“Monolith is willing to negotiate the settlement of the pending case * * * with the understanding that in such settlement the principal amount of the refunds * * * will be computed in a manner wherein the costs, etc., attributable to iron cinders, fluorspar and bags and bagging are excluded.”

That on January 2, 1958, as an inducement to plaintiff's agreeing to a further continuance of the case, defendants, by Charles K. Rice, Assistant Attorney General, Tax Division, accepted plaintiff's proposal as follows:

“* * * we have been advised that the District Director of Internal Revenue at Los Angeles has been requested to recompute the amount of tax and assessed interest (if any) refundable to the taxpayer as the result of computing the taxpayer's gross income subject to depletion on the basis of its sales price of bulk cement as applied to its total production, excluding cost of iron cinders, fluorspar, bags and the cost attributable to bagging.”

That on January 9, 1958, plaintiff replied to defendants as follows:

“* * * This basis is satisfactory to Monolith. In addition, we will continue our joint effort to

conclude both the Monolith and the Monolith Portland Midwest Company tax refund matters for the years 1951 to and including, 1954 * * *”

IV.

That under the terms of the agreement of the parties: (a) plaintiff’s gross income from mining for 1951 is \$8,107,655.70; [393] (b) plaintiff’s costs and expenses attributable to mining is \$6,861,489.51; and (c) plaintiff’s net income from mining is \$1,246,166.19. That 15% of the gross income from mining is \$1,216,148.36, and 50% of the net income from mining is \$623,083.10.

V.

That these figures comply with the accounting procedures herein set out, and result in plaintiff’s being entitled to a tax refund for the year 1951 in the amount of \$260,773.20 plus the amounts of assessed interest, with interest at 6% per annum.

Wherefore, plaintiff prays that it be awarded judgment against the defendants in the sum of \$260,773.20, plus the amounts of interest assessed against plaintiff on account of its income taxes for the year 1951, plus interest at the rate of 6% per annum from the dates of payment.

ENRIGHT & ELLIOTT,

By

Affidavit of service by mail attached.

[Endorsed]: Filed January 31, 1958. [394]

[Title of District Court and Cause.]

MINUTES OF THE COURT

MARCH 21, 1958

Present: Hon. Wm. C. Mathes, District Judge.

Counsel for Plaintiff: Jos. T. Enright,
Bill B. Betz, Norman Elliott.

Counsel for Defendant: John G. Messer,
Assistant U. S. Attorney; Gerard
O'Brien, Assistant Attorney General.

Proceedings: For trial. Court convenes at 9:30 a.m.
Court orders trial proceed.

Attorney Enright makes opening statement.

Attorney O'Brien makes opening statement.

Plf's Exs. 24, 25, and 26 are marked for ident.
and received into evidence. (Exhibit 26 is received
as excluded evidence.) (Pursuant to Rule 43(c).)

Plf's Exs. 27 and 28 are marked for ident. and
received into evidence.

William E. Neuhauser is called, sworn, and testi-
fies for plaintiff.

Plf's Ex. 29 is marked for ident. and received
into evidence (as to year 1951 only).

Plf's Ex. 30 is marked for ident. and received into
evidence.

At 11:52 a.m. court recesses. At 1:55 p.m. court
reconvenes herein. All present as before. Court or-
ders trial proceed.

William E. Neuhauser resumes testimony.

Waldo A. Gillette is called, sworn, and testifies
for plaintiff.

Plf's Exs. 31 and 32 are marked for ident. and received into evidence.

Kenneth H. Pilkenton is called, sworn, and testifies for plaintiff as adverse witness.

At 3:05 p.m. court recesses. At 3:10 p.m. court reconvenes herein. All present as before. Court orders trial proceed.

Plaintiff rests.

It Is Ordered that cause is continued for oral argument and further trial to March 24, 1958, 10 a.m.

JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy Clerk. [425]

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINTS
TO CONFORM TO PROOF

Comes now the plaintiff and amends its complaint to conform to the proof.

I.

Omit paragraphs IX and XIV and substitute as paragraph IX the following, to allege:

The plaintiff, during the tax year 1951, maintained its books on the accrual basis and reported its taxes upon a calendar year basis. The plaintiff timely filed its income tax return for the year 1951, and, based upon the Regulations of the Commis-

sioner of Internal Revenue, computed its depletion deduction, resulting in a reported income tax liability, as shown on said return, in the sum of \$384,411.65, plus an interest liability in the sum of \$382.49. Thereafter, in the [426] year 1953, defendant caused the said return to be audited, and assessed a deficiency in tax against plaintiff in the sum of \$3,914.97 plus interest in the sum of \$367.79. The above taxes, deficiency and interest were paid by plaintiff on the following dates and in the following amounts:

March 17, 1952.....	\$126,000.00
June 13, 1952.....	\$126,000.00
September 16, 1952.....	\$ 75,262.55
December 15, 1952.....	\$ 57,531.59
February 15, 1954.....	\$ 4,282.70

II.

Omit paragraphs XII and XV and substitute as paragraph XII the following, to allege:

The amount of tax required to be paid by plaintiff was the sum of \$124,641.43, which amount when deducted from the payments alleged in paragraph I hereof results in an overpayment in the amount of \$264,435.41 or a refund due to plaintiff in that amount plus interest at the rate of 6% per annum from the date of each of the payments to the extent each payment resulted in an overpayment. No part of the overpayment by plaintiff has been credited, remitted, refunded or repaid to plaintiff.

Wherefore, plaintiff prays that it be awarded judgment against defendants in the sum of \$264,-435.41 plus interest at the rate of 6% per annum from the dates of each overpayment.

ENRIGHT & ELLIOTT,
J. HOWARD SULLIVAN,

By /s/ JOSEPH T. ENRIGHT,
Attorneys for Plaintiff.

[Endorsed]: Filed March 24, 1958. [427]

[Title of District Court and Cause.]

ANSWER TO SUPPLEMENT
TO COMPLAINT

Come Now the United States and R. A. Riddell, District Director of Internal Revenue, by its and his attorneys, Laughlin E. Waters, United States Attorney for the Southern District of California, and answer the allegations of the complaint as follows:

1. Deny the allegations of paragraph I of the supplement to complaint. Defendants allege that since the proceedings in this case were closed taxpayer by this supplement to complaint is amending paragraphs VI, VII and VIII of its complaint and is now proceeding upon the legal theory that the income which is attributable to bags, bagging and loading of the bags filled with cement are non-mining processes under Sections 23(m) and 114(b)

(4) of the Internal Revenue Code of 1939 and beyond the stage at which plaintiff first sells its mineral product in commerce (that is, cement sold in bulk form, f.o.b., plant). Defendants do not admit to the validity of [428] this legal theory but do admit that there is a dispute between the parties as to the proper method of accounting to be used in computing the tax refund due the plaintiff should the plaintiff's present legal theory be sustained.

2. Deny the allegations contained in paragraph II of the supplement to complaint. Defendants reaffirm herein the matters alleged in answer to paragraph I of the supplement to complaint.

3. Deny. Defendants allege that on December 4, 1957, plaintiff sent a telegram to Assistant Attorney General Charles K. Rice containing an offer to negotiate settlement of the pending case. Defendants did not accept plaintiff's proposal for settlement and plaintiff expressly withdrew its offer to settle the pending case by telegram dated March 16, 1957, and addressed to the Tax Division of the Justice Department which stated:

"This will be our position tomorrow and we are asking that Monolith's and your accountants be heard forthwith and that the case be argued and submitted."

4. Deny.

5. Deny.

Wherefore, defendants demand that plaintiff's complaint and its supplement to complaint be dis-

missed with prejudice, and that costs be allowed to the defendants.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States Attorney, Chief, Tax Division;

JOHN G. MESSER,
Assistant U. S. Attorney;

/s/ JOHN G. MESSER,
Attorneys for Defendants, United States of America, and R. A. Riddell.

Receipt of copy acknowledged.

[Endorsed]: Filed March 24, 1958. [429]

[Title of District Court and Cause.]

MINUTES OF THE COURT
MARCH 24, 1958

Present: Hon. Wm. C. Mathes, District Judge.

Counsel for Plaintiff: Jos. T. Enright
and Bill B. Betz.

Counsel for Defendant: Gerard O'Brien
and John G. Messer.

Proceedings: For further trial (oral argument).

Attorney for plaintiff argues.

Plf's Ex. 33 is marked for ident. and received in evidence.

Lodged plaintiff's proposed Ultimate Findings Memo.

Attorney for defendant argues.

Attorney for plaintiff argues in rebuttal.

Court rules that the case is dismissed without prejudice as against the Director of Internal Revenue, R. A. Riddell.

Attorney for plaintiff to prepare findings and judgment within ten days.

JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy Clerk. [430]

[Title of District Court and Cause.]

NOTICE OF ENTRY

Re: Monolith Portland Cement Co. vs. U. S. A.,
et al., No. 20256—WM.

You are hereby notified that Order for election as between defendants and dismissal defendant Robert A. Riddell, etc., and judgment in the above-entitled case has been entered this day in the docket.

Dated: April 14, 1958.

CLERK, U. S. DISTRICT
COURT,

By C. A. SIMMONS,
Deputy Clerk. [460]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Come Now the United States and R. A. Riddell, District Director of Internal Revenue, by its and his attorney, Laughlin E. Waters, United States Attorney for the Southern District of California, and answer the allegations of the amended complaint as follows:

1. Admits the allegations contained in Paragraph I of the amended complaint.

2. Denies the allegations contained in Paragraph II of the amended complaint, except to admit that the amount of tax required to be paid by plaintiff was the sum of \$124,641.43 and that no part of the sum of \$264,435.41 has been credited, remitted, refunded, or repaid to plaintiff.

Wherefore, defendant prays that plaintiff's complaint as amended be dismissed with prejudice and defendants be allowed their court costs. [441]

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States Attorney, Chief, Tax Division;

JOHN G. MESSER,
Assistant U. S. Attorney.

/s/ JOHN G. MESSER,
Attorneys for Defendant,
United States of America.

Affidavit of service by mail attached.

[Endorsed]: Filed April 7, 1958. [442]

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED AMENDMENTS
TO PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW LODGED
BY DEFENDANT ON APRIL 4, 1958

Findings of Fact

I.

The tons of raw materials produced and used (including withdrawals from inventory) by plaintiff and the tons of raw materials purchased and used (including withdrawals from inventory) by plaintiff in the year 1951 are as follows:

	Tons Produced	Tons Used
Limestone	769,946	771,254
Clay #1	93,425	95,102
Clay #2	21,270	21,659
Tufa	9,237	9,223
Gypsum	22,310	23,393
	<hr/>	<hr/>
Total	916,188	920,631
	<hr/>	<hr/>

	Tons Purchased	Tons Used
Iron Cinders	11,916	7,563
Fluorspar	90	98
	<hr/>	<hr/>
	12,006	7,661
	<hr/>	<hr/>
Total raw materials.....	928,194	928,292
	<hr/>	<hr/>

Each raw material listed is identified by the name used by plaintiff in keeping its raw materials pro-

duction records, except that "Clay #2" is identified as "silica" in said raw materials production records. (Stipulation of Facts No. 1, Paragraph V.)

II.

Plaintiff mines gypsum at its quarry located at a distance of approximately 120 miles from its cement plant.

III.

Plaintiff also mines clay, tufa and silica, all of which are mined within 50 miles of its cement plant.

Conclusions of Law

I.

In computing gross income from mining and net income from mining for percentage depletion purposes, plaintiff is not entitled to a percentage depletion allowance for clay, silica, tufa and gypsum under the provisions of Section 114(b)(4) of the Internal Revenue Code of 1939, as amended.

II.

The materials purchased by plaintiff from others as set forth in the findings of fact herein are not subject to depletion allowance by this plaintiff.

III.

Computation of percentage depletion allowance and amount of refund to which plaintiff is entitled in accordance with these findings of fact and conclusions of law are as follows:

Sales Per Return.....	\$8,702,101.
Less: Royalties	133,340.

Less: Miscellaneous Sales.....	3,201.
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Cement Sales	\$8,565,559.
--------------------	--------------

Less:

- | | |
|---|---------------|
| 1. Trade discounts | \$ 434,770.26 |
| 2. Trucking—Contract and Own Fleet
Costs | 815,483.36 |
| 3. Rail Freight | 212,558.53 |
| 4. Warehouse and Bulk Storage Plant
Costs at Distribution Points..... | 49,774.95 |
| 5. Additional Charge for Sales in Bags.... | 389,350.00 |
| 6. *Purchased Materials | 70,665.87 |
| 7. **Materials Mined by Plaintiff but Not
Subject to Depletion Allowance | 1,378,334.71 |

Total Eliminations from Gross Sales.....	\$3,350,937.
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Gross Income from Mining.....	\$5,214,621.
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Statutory Depletion:

10% of Gross Income from Mining.....	\$521,462.
--------------------------------------	------------

Gross Income from Mining

(See Above)	\$5,214,621.
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Mining Expenses	\$7,689,687.54
-----------------------	----------------

Less:

- | | |
|---|---------------|
| 1. Trade Discounts | \$ 434,770.26 |
| 2. Trucking Costs—Contracts
and Own Fleet..... | 815,483.36 |
| 3. Rail Freight | 212,558.53 |
| 4. Warehouse and Bulk
Storage Plant Costs
at Distribution Points. | 49,774.95 |
| 5. Cost of Bags and Bag-
ging Expenses | 771,119.85 |
| 6. *Purchased Materials | 63,439.92 |
| 7. **Materials Mined by
Plaintiff but not Sub-
ject to Depletion Al-
lowance | 1,237,392.99 |

Total Eliminations	\$3,584,539.86
--------------------------	----------------

Allowable Mining Expense.....	4,105,147.68
Net Income from Mining.....	<u>\$1,109,474.12</u>
Depletion Allowable:	
Depletion—10% of Gross	
Income from Mining.....	<u>\$ 521,462.18</u>
Limitations:	
50% of Net Mining Income	<u>\$ 554,737.06</u>
Allowable Depletion	
Deduction	<u>\$ 521,462.18</u>
Computation of Refund—Year 1951:	
Taxable Income Per Prior Revenue Agent's	
Report	\$780,744.09
Additional Depletion Allowable:	
Allowable Depletion Computed Herein.....	\$521,462.18
Allowed Per Prior Revenue Agent's Report....	<u>109,244.28</u>
Additional Depletion Allowable.....	<u>412,217.90</u>
Revised Taxable Income.....	<u>\$368,526.19</u>
Income Tax Computation	
Revised Taxable Income (above).....	\$368,526.19
Less: Capital Gains.....	<u>8,785.16</u>
Revised Ordinary Income.....	<u>\$359,741.03</u>
Income Tax Thereon, 50.75% Less \$5,500.00.....	\$177,068.57
Income Tax on Capital Gains, 25%.....	2,196.29
Adjustment for Partially Tax Exempt Interest...	<u>(138.89)</u>
Revised Tax	<u>\$179,125.97</u>
Refund Due	
Income Tax Per Prior Revenue Agent's Report.....	\$388,326.56
Revised Tax (See Above).....	<u>179,125.97</u>

Refund Due	\$209,200.8
Plus Assessed Interest (367.79 + 382.48).....	750.2
Total Refund Plus Assessed Interest.....	<u>\$209,950.8</u>

Notes

*Purchased Materials:

	Tons Used
Iron Cinders	7,563
Fluorspar	98
Purchased Materials Used.....	7,661
Total Tonnage Used.....	<u>928,292</u>

Ratio Purchased Materials Used to Total Tonnage Used:

$$7,661 \div 928,292 = .825\%$$

$$\text{Total Sales} \dots\dots\dots \$8,565,559.48 \times .825 = \$70,665.8$$

This amount is eliminated from depletable sales as being minerals not mined by taxpayer but purchased, hence not subject to depletion by plaintiff but subject to depletion by other mine owners or mine operators.

**Materials Mined by Plaintiff but not Subject to Depletion Allowance:

	Tons Used
Clay 1	95,102
Clay #2	21,659
Tufa	9,223
Gypsum	23,393
Non-Depletable Tonnage Used.....	<u>149,377</u>
Total Tonnage Used	<u>928,292</u>

Ratio Non-depletable Tonnage

Used to Total Tonnage Used....16.09159%

Total Sales:

$\$8,565,559.48 \times .1609159 = \$1,378,334.71$

****Materials Mined by Plaintiff but not Subject to Depletion Allowance:**

These minerals are not subject to depletion, hence the portion of the total selling price of bulk cement that is attributable to these non-depletable minerals is eliminated as the code does not provide for depletion on sales of these minerals.

Eliminate From Expense:

Total Expense $\$7,689,687.54$

Eliminated:

Same ratio of .825% used to eliminate expense as was used in Sales Elimination.
See explanation as to sales.

Purchased Materials:

$.825\% \times \$7,689,687.54 = \$63,439.92$

This is portion of total expense applicable to purchased material and is eliminated from total expense.

Mined but not Depletable Minerals:

Same ratio as used to eliminate sales16.09159%

$16.09159\% \times \$7,689,687.54 = \$1,237,392.99$

This is portion of total expense that is attributable to non-depletable minerals mined by taxpayer and is eliminated from total expense.

Dated: April 9, 1958.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States Attorney, Chief, Tax Division;

JOHN G. MESSER,
Assistant United States Attorney;

/s/ JOHN G. MESSER,
Attorneys for Defendants.

[Endorsed]: Filed April 9, 1958.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION
TO AMEND DEFENDANT'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS
OF LAW IN ACCORDANCE WITH DE-
FENDANT'S PROPOSED AMENDMENTS
FILED ON APRIL 9, 1958

This cause came on for hearing on April 14, 1958, before the Honorable William C. Mathes, Judge Presiding, for the settlement of findings of fact and conclusions of law and the defendant having moved to amend its proposed findings of fact and conclusions of law lodged with the clerk on April 4, 1958, in accordance with defendant's proposed amendments filed April 9, 1958;

It is found that defendant's motion to amend its proposed findings of fact and conclusions of law lodged with the clerk on April 4, 1958, in accordance with its proposed amendments filed April 9, 1958, is both untimely and without merit. Therefore,

It Is Ordered that the defendant's motion is denied.

Done in Open Court April 14, 1958.

/s/ WM. C. MATHES,

United States District Judge.

Receipt of copy acknowledged.

Lodged April 17, 1958.

[Endorsed]: Filed April 24, 1958.

United States District Court for the Southern
District of California, Central Division

No. 20256—WM Civil

MONOLITH PORTLAND CEMENT COMPANY,
a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA and R. A.
RIDDELL, Etc.,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT

This cause came for trial on March 21, 1958, before the Honorable William C. Mathes, Judge, presiding, without the intervention of a jury. Plaintiff was represented by its counsel, Enright & Elliott and J. Howard Elliott, by Joseph T. Enright, and defendants United States of America and Robert A. Riddell, District Director of Internal Revenue, Los Angeles District, were represented by their counsel, Laughlin E. Waters, United States Attorney, Southern District of California; Edward R. McHale, Assistant United States Attorney, Chief, Tax Division; John G. Messer, Assistant United States Attorney; and Gerard J. O'Brien, Assistant United States Attorney, Department of Justice, Washington, D. C. The Court having heard and considered all the evidence, stipulations of facts, exhibits, memoranda and argument of

counsel, makes the following findings of fact and conclusions of law: [482]

Findings of Fact

I.

During all times herein mentioned, the plaintiff, Monolith Portland Cement Company, a Nevada corporation, was and now is a corporation duly qualified to conduct, and is conducting, business in the State of California, with its principal office in the City of Los Angeles, State of California.

II.

This is an action for refund of corporation income taxes for the year 1951. The taxes herein involved were paid by plaintiff to Robert A. Riddell, District Director of Internal Revenue, Los Angeles District, Los Angeles, California.

III.

During the entire year 1951 plaintiff mined a calcium carbonate rock generally known as "limestone," which it processed by the usual and customary process steps applied in the cement industry to obtain any of the various types of Portland cement. Said processes were applied by plaintiff at its cement plant at Monolith, California, adjacent to the quarry from which plaintiff mines the limestone. The process of heating or calcining of the materials used by plaintiff caused chemical changes to occur in them to obtain cement.

IV.

At the completion of the processes referred to above, the cement was stored in silos from which it was loaded and shipped in bulk; or from which it was bagged and loaded and shipped in bags.

V.

The actual computed average high and low chemical analysis, made approximately each week, of the material mined by plaintiff during the year 1951 revealed a high of 87.68% calcium carbonate and a low of 82.45% calcium carbonate, or an average of 85.20% of calcium carbonate. The calcium carbonate content of plaintiff's limestone involved in this case was not high enough to qualify the material as "chemical grade limestone" within the meaning of Section 114(b)(4)(A)(iii) of the Internal Revenue Code of 1939, as amended. [483]

VI.

The only product sold by plaintiff during the year 1951 as a result of its limestone mining operations was Portland cement in bulk and in bag or sack containers.

VII.

The plaintiff pays royalties for the limestone which it mines and uses in making its Portland cement.

VIII.

Plaintiff stores its bulk cement in silos at its cement plant and also at bulk storage distribution points away from its cement plant.

IX.

During the year 1951, 63.49% of plaintiff's cement sales were of bulk cement. The remaining sales were of cement placed in bag or sack containers.

X.

In the principal marketing area served by plaintiff, the market for limestone such as plaintiff mined at its quarry was negligible unless it was processed to obtain cement.

XI.

The commercially marketable mineral product obtained by plaintiff from mining during the year 1951 was bulk Portland cement at its plant at Monolith, California.

XII.

The cost of bags and sack containers and the costs attributable to bagging and sacking are not ordinary treatment processes normally applied by mine owners or operators to obtain the commercially marketable mineral product Portland cement in bulk form.

XIII.

The additional charge made by plaintiff on its sales of Portland cement sold in containers is to be eliminated from its [484] gross sales in order to arrive at "gross income from mining." Also to be eliminated from gross sales are royalties, trade discounts, contract trucking and own fleet trucking costs, rail freight, and warehouse and bulk storage

plant costs at distribution points away from plaintiff's cement plant.

XIV.

In computing net income from mining, the following items are to be eliminated from expenses: trade discounts, contract trucking and own fleet trucking costs, rail freight, warehouse and bulk storage plant costs at distribution points away from plaintiff's cement plant, and cost of bags and costs attributable to bagging.

XV.

The computation of statutory depletion allowance for the year 1951 is as follows:

Sales per return	\$8,702,101.20
Less: Royalties	133,340.02
	<hr/>
	\$8,568,761.18
Less: Miscellaneous sales	3,201.70
	<hr/>
Cement sales	\$8,565,559.48
Less:	
1. Trade discounts	\$434,770.26
2. Trucking—contract and own fleet costs	815,483.36
3. Rail freight	212,558.53
4. Warehouse and bulk storage plant costs at distribution points	49,774.95
5. Additional charge for sales in bags	389,350.00
	<hr/>
Total elimination from gross sales	\$1,901,937.10
	<hr/>
Gross income from mining	\$6,663,622.38
	<hr/> <hr/>

Statutory depletion:

10% of gross income from mining\$666,362.24

Gross income from mining (see above)\$6,663,622.38

Mining expenses\$7,689,687.54

Less:

1. Trade discounts\$434,770.26

2. Trucking costs—
contract and own
fleet 815,483.36

3. Rail freight 212,558.53

4. Warehouse and bulk
storage plant costs at
distribution points.. 49,774.95

5. Costs of bags and
bagging expenses.... 771,119.85

Total eliminations\$2,283,706.95

Allowable mining expense.....\$5,405,980.59

Net income from mining\$1,257,641.79

Depletion Allowable:

Depletion—

10% of gross income from mining\$666,362.24

Limitation:

50% of net income from mining\$628,820.89

Allowable depletion deduction\$628,820.89

XVI.

The record shows, and the Court finds as a fact, that limestone of a relatively high calcium carbonate content is known in industry and commerce as chemical or metallurgical grade limestone.

XVII.

On March 9, 1955, plaintiff duly filed its claim for refund with defendant setting forth the grounds upon which the refund was claimed and upon which this suit was commenced.

XVIII.

The defendant neither allowed nor disallowed said claim for refund and more than six (6) months elapsed from the time of filing said claim for refund to the time of filing this suit on July 27, 1956.

XIX.

No part of the sum claimed by plaintiff has been credited, remitted or paid to the plaintiff or to any one on its account. Plaintiff was, and now is, the owner of said claim for refund and has not assigned or transferred said claim or any part thereof to others.

XX.

During the year 1951, plaintiff maintained its books and records on the accrual basis of accounting and filed its return on the calendar year basis.

XXI.

Plaintiff timely filed its income tax return for the year 1951 and, based upon the Regulations of the Commissioner of Internal Revenue, computed its depletion allowance deduction which resulted in a reported income tax liability, as shown on said return, in the sum of \$384,411.65, plus an interest

liability in the sum of \$382.49. Thereafter, in the year 1953, defendant caused said return to be audited, and assessed a deficiency in tax against plaintiff in the sum of \$3,914.97, plus interest in the sum of \$367.79. The said [487] taxes, deficiency and interest were paid by plaintiff on the following dates and in the following amounts:

March 17, 1952.....	\$126,000.00
June 13, 1952.....	126,000.00
September 16, 1952.....	75,262.55
December 15, 1952.....	57,531.59
February 15, 1954.....	4,282.70
Total	<u>\$389,076.84</u>

XXII.

Counsel for defendant United States of America waived all objections to maintenance of this action by plaintiff against said United States of America in this District upon dismissal of this action against defendant Robert A. Riddell, District Director of Internal Revenue, Los Angeles District.

XXIII.

All conclusions of law which are or are deemed to be findings of fact are hereby found as facts and incorporated herein as findings of fact.

Conclusions of Law

I.

This Court has jurisdiction of the subject matter and of the parties hereto pursuant to Title 28, United States Code, Section 1346(a)(1).

II.

Plaintiff, as mine operator, mined a calcium carbonate rock generally known as "limestone" which it processed to obtain any of the various types of Portland cement.

III.

"Chemical grade limestone" within the meaning of the term as used in Section 114(b)(4)(A)(iii) of the Internal Revenue Code of 1939, as amended, means a limestone which is of a relatively [488] high calcium carbonate content.

IV.

The calcium carbonate rock mined by plaintiff was just a "chemical grade limestone" within the meaning of the statute, and was subject to a percentage depletion allowance of ten (10) per centum within the provisions of Section 114(b)(4)(A)(ii) of the Internal Revenue Code of 1939, as amended.

V.

The commercially marketable mineral product obtained by plaintiff was bulk Portland cement at its plant in Monolith, Calif., located within a distance of fifty (50) miles from the quarry operated by plaintiff.

VI.

Plaintiff is entitled to a depletion allowance at the rate hereinabove set forth on its gross sales of bulk cement f.o.b. its plant at Monolith, California,

but adjusted for the items as set forth in the findings of fact herein and limited to fifty (50) per centum of the net income from mining as adjusted for the items as set forth in the findings of fact herein.

VII.

Bagging and costs attributable to bagging are not ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product bulk Portland cement.

VIII.

Plaintiff is entitled to refund of income taxes for the year 1951 based on a percentage depletion allowance, as computed in the findings of fact herein, in the amount of \$628,820.89.

IX.

Based on the percentage depletion allowance set forth above, plaintiff is entitled to refund of income taxes for the year 1951 in the amount of \$264,435.41, with interest thereon at the rate of six (6) per centum per annum as provided by law, from the following [489] dates and upon the following portions of this amount:

March 17, 1952.....	\$ 1,358.57
June 13, 1952.....	126,000.00
September 16, 1952.....	75,262.55
December 15, 1952.....	57,531.59
February 15, 1954.....	4,282.70
	<hr/>
	\$264,435.41
	<hr/>

X.

The items of royalties, trade discounts, trucking (contract and own fleet costs), rail freight, warehouse and bulk storage plant costs at distribution points away from plaintiff's cement plant, additional charge for sales in bags, costs of bags and bagging expense are to be eliminated from gross sales from mining and from net income from mining as set forth in the findings of fact herein.

XI.

All findings of fact which are deemed to be conclusions of law are hereby incorporated in these conclusions of law.

Judgment

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ordered, adjudged and decreed:

(1) That this action be, and hereby is, dismissed as to defendant, Robert A. Riddell, District Director of Internal Revenue, Los Angeles District, without prejudice to the plaintiff to maintain this action against defendant United States of America within this District;

(2) That plaintiff, Monolith Portland Cement Company, a Corporation, do have and recover judgment against the defendant, United States of America, in the sum of \$264,435.41, plus interest

thereon, as provided by law, from the dates of payment thereof by [490] plaintiff.

Dated: This 14th day of April, 1958.

/s/ WM. C. MATHES,

United States District Judge.

Lodged April 4, 1958.

[Endorsed]: Filed and entered April 14, [491] 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Defendant, United States of America and to Its Attorneys, Laughlin E. Waters, United States Attorney; Edward R. McHale, Assistant United States Attorney, Chief Tax Division, and John G. Messer, Assistant United States Attorney:

You and Each of You Are Hereby Notified that Monolith Portland Cement Company, plaintiff herein, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from such portion of the Order and Final Judgment (page 9, 11. 22-23) entered and docketed in this action on the 14th day of April, 1958, as recites that such judgment is based upon the Court's Findings of Fact and Conclusions of Law, in that insofar as such

judgment is purportedly based upon Findings V and XVI and Conclusion III and IV of the Court's Findings of Fact and Conclusions of Law, finding that the calcium carbonate rock mined by plaintiff was not "chemical grade limestone" within the meaning of Section 114(b)(4)(A)(iii) of the Internal [492] Revenue Code of 1939 as amended, the court erred in that such findings and conclusions are:

1. A misapplication of Section 114(b)(4)(A)(iii) of the Internal Revenue Code of 1939;

2. Prejudicial to plaintiff because they may deprive plaintiff of its right to have the quality of its limestone in future years determined under the then applicable law.

Dated: May 16, 1958.

ENRIGHT & ELLIOTT,

By /s/ NORMAN ELLIOTT,
Attorneys for Plaintiff Monolith Portland Cement
Company.

Affidavit of service by mail attached.

[Endorsed]: Filed May 16, 1958. [493]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Above-Named Plaintiff and to Its Attorneys,
Enright & Elliott, 541 South Spring Street, Los
Angeles 13, California:

You, and Each of You, Are Hereby Notified That
the defendant, United States of America, does
hereby appeal to the United States Court of Ap-
peals for the Ninth Circuit from the judgment in
favor of plaintiff and against defendant entered in
the Civil Docket April 14, 1958, in the above-entitled
action.

Dated: June 10, 1958.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE
Assistant United States At-
torney, Chief, Tax Division;

JOHN G. MESSER,
Assistant United States
Attorney;

/s/ JOHN G. MESSER,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 10, 1958. [497]

In the United States District Court, Southern
District of California, Central Division

No. 20256-WM Civil

MONOLITH PORTLAND CEMENT COMPANY,
a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA and R. A.
RIDDELL, District Director of Internal Revenue,
Los Angeles District,

Defendants.

Honorable William C. Mathes, Judge Presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Friday, March 21, 1958

Appearances:

For the Plaintiff:

ENRIGHT & ELLIOTT, by
JOSEPH T. ENRIGHT, ESQ.,
WILLIAM B. BETZ, ESQ., and
NORMAN ELLIOTT, ESQ.

For the Defendants:

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,

Assistant United States Attorney,
Chief, Tax Division; by

JOHN G. MESSER,

Assistant United States Attorney; and

GERARD O'BRIEN,

Special Attorney, Attorney General's
Office.

* * *

WILLIAM E. NEUHAUSER

called as a witness on behalf of the plaintiff, being
first sworn, was examined and testified as [50*] fol-
lows:

* * *

Direct Examination

By Mr. Enright:

* * *

Q. Directing your attention to Exhibit No. 29 for
identification, from what source did you obtain the
items set forth on page 29 of Exhibit No. 29?

A. What page was that?

Q. Page 1 of Exhibit No. 29.

A. Most of these figures came from the revenue
agent's report.

Q. What else did you do in order to ascertain
the figures set forth on page 1 of Exhibit No. 29?

A. Page 1 is a computation of the amount of re-
fund due.

Q. Yes.

(Testimony of William E. Neuhauser.)

A. The figures were obtained from the revenue agent's report, and the other figures are the results of our arithmetical computations that we made.

Q. Now, in order to make those arithmetical computations did you make a computation to exclude bags and bagging operation from the original claim and the original return and the agent's audit?

A. Yes.

Q. Will you proceed to state what page of your report the exclusion of bags and bagging is set [55] forth?

A. I believe that is shown on the second page.

Q. Explain how you arrived and made the computation. Explain how you made the computation to exclude bags and bagging, that operation.

A. Well, we first determined from the company records the number of barrels of bagged cement that were sold in 1951. We also determined, through inspection of price lists and discussions with company officials that 40 cents a barrel was added to the selling price of cement when it was sold in bag form.

We multiplied this 40 cents a barrel by the number of barrels of bagged cement that were sold in 1951, and thus arrived at the sales price, additional sales price of bagged cement, which is shown on this statement as \$389,350.

Q. And that is contained on page 2, being Note (1)? A. That's correct.

Q. Page 3, rather? A. Yes, page 3.

Q. What was the next step you made to arithmetically exclude bags and bagging?

(Testimony of William E. Neuhauser.)

A. Having excluded the income, bagging income, we determined what the bagging expense was. I determined that by finding from the company records the actual cost of bags used in 1951; and we determined that the cost of the company's bag and load department, which includes the bagging [56] operation, was \$467,564.61.

We discussed with the people in——

Mr. O'Brien: May I have that figure again, please?

The Witness: \$467,564.61.

Mr. O'Brien: Thank you.

The Witness: We discussed with the company officials, who were in the best position to know, the operations of the company's bagging and loading department, what portion of that figure would properly represent the cost of bagging cement.

We were also supplied with certain statistical data worked up by the company which determined the labor hours spent in that department on loading bulk cement as opposed to sack cement.

The resulting percentage, which we determined then to be properly the portion of those costs attributable to the bagging operation, was 70 per cent, and when applied to the total cost figure that gave us a cost of \$327,295.23.

We then had the cost of the bags used, the cost of the labor and other costs involved in getting the cement into bags, and we assigned then to the bagging operation a fair portion of the general and adminis-

(Testimony of William E. Neuhauser.)

trative costs and arrived at our total expense attributable to the bagging operation.

Q. (By Mr. Enright): And that total expense is shown on page 3 of the report? [57]

A. Yes.

Q. What is that total expense?

A. \$771,119.85.

Q. Now, we will go back a moment here. Did you ascertain that for the year 1951 the company did not keep departmental breakdown costs of the bagging as distinguished from total pack house costs?

A. That is correct. They did not keep this.

Q. Now, did you ascertain whether or not at a later date the company did commence keeping such records?

A. Yes. The company began keeping such a record in 1957.

Q. And you have checked those records, have you, and their method of being kept?

A. Yes, we have.

Q. As a certified public accountant did you check the practices in connection with the keeping of those records? A. Yes.

Q. Have you made a comparison of the costs kept on this particular item of sacking with the costs that you ascertained by referring to the records of 1951 in the manner in which they were kept and your study and investigation at that time?

Mr. O'Brien: Before we proceed, your Honor, I am not sure that I understand the pertinency of the question. Of [58] course, the year in suit is 1951.

(Testimony of William E. Neuhauser.)

The Court: I assume it's leading to a comparison.

Mr. Enright: That is correct, your Honor.

The Court: A check, probably, of percentages to buttress the testimony he has given as to the year in question.

Mr. Enright. I understand that perhaps there is an issue, and I would like to get it clear at this time.

The Court: In other words, for 1951 it would be an estimate, as the witness has testified to, for some other year when the records were in fact kept. It would be at least an estimate of the higher order. And I assume that you expect to show that they are most consistent, percentagewise.

Mr. Enright: Yes. Percentagewise—in fact, the figure we have here is very conservative. And I might——

The Court: Is there objection on that ground?

Mr. O'Brien: Yes, your Honor. I just wanted to see the pertinency and the line of testimony.

Mr. Enright: I might inquire if we could be furnished during the noon recess the agent's computations, which we understand result in a slight difference in these accounting practices, so that we can study it to find out what this difference is. I understand there is only a few thousand dollars involved.

May we have the agent's report?

Mr. O'Brien: I will discuss that with you at lunch time. [59]

The Court: The objection is overruled.

(Testimony of William E. Neuhauser.)

Q. (By Mr. Enright): What did you find the difference to be, if any, between your estimate and computation for 1951, as you stated you prepared it, with this computation under actual records kept in the due course of business?

A. The records that have been kept in 1957 would indicate that probably the 70 per cent factor was low, and that a greater part of the total costs are attributable to the bagging department.

Q. Than the amounts you have set forth here?

A. Yes.

Q. Now, having ascertained the bagging expense to be \$771,119.85, did you further proceed to compute the refunds to reflect an exclusion of the purchased materials, fluorspar and iron cinders?

A. Yes, we did.

Q. Would you refer us to the page of the report where we may check through that exclusion?

A. Page 3, Note (3) explains how that exclusion was made.

Q. Will you state what you did as a certified public accountant to exclude iron cinders and fluorspar from the refund computation?

A. We determined from the company records the total tons of material that were placed into production in the [60] year 1951. We also determined the tonnage of cinders and fluorspar that were placed into production in that year.

We then determined what percentage the tonnage of cinders and fluorspar bore to the total tonnage, and that gave us a percentage figure which we used

(Testimony of William E. Neuhauser.)

then to eliminate purchased material income and expense.

Q. What did you find the percentage of your fluorspar and iron cinders to be of the total tons of materials used to obtain cement? A. .825%.

Q. Now, having ascertained that percentage figure, did you allocate by that percentage figure, the amount of moneys designated as gross income upon the agents' audit report for the year 1951, or the income tax return of the taxpayer for 1951?

A. Well, Mr. Enright, we had taken the gross income figures shown on the agent's report and had already eliminated from it the income attributable to the bagging operation. We then applied the percentage we had obtained, the .825% to the remaining gross income to arrive at the portion of that gross income attributable to purchased material.

Q. And that is shown on page 2?

A. Yes. It is \$68,553.78.

Q. Leaving the remainder, after exclusion of the bagging as you have stated, and exclusion of this purchased [61] material, fluorspar and iron cinder, leaving the remainder as gross income for computation of the depletion allowance?

A. That's correct.

Q. Now, will you proceed to state how you computed the expenses concerning purchased material, iron cinders and fluorspar?

A. That was done in the same manner. We had

(Testimony of William E. Neuhauser.)

eliminated from the total expenses those expenses attributable to the bagging operation.

Q. That is shown on page 2?

A. Yes. We applied the percentage of .825 to the remaining expenses to arrive at the expenses attributable to purchased material. The remaining expenses were then attributable to mined material.

Q. And the mined material expense of \$6,861,-489.51, as shown in the second column on page 2, was then deducted, was it, from the gross income, to arrive at net income? A. That's correct.

Q. And your next computation was the rate of depletion on gross income, is that correct?

A. Yes.

Q. That was shown to be \$1,216,148.36?

A. Correct.

Q. If the rate were 10 per cent, what would be the allowance for depletion? [62]

A. \$810,765.57.

Q. That you have interlineated in this computation since it was originally prepared, is that correct? A. Yes.

Q. Now, to ascertain depletion allowance subject to the 50 per cent of net income limitation, what did you next do when you originally prepared this computation?

A. Yes. We did ascertain the 50 per cent of net income limitation, which is shown as \$623,083.10.

Q. And what would be the limitation if the rate of depletion were 10 per cent?

A. The same figure.

(Testimony of William E. Neuhauser.)

Q. Referring now to the first page of your report, what is shown there, Mr. Neuhauser?

A. It is showing the refund that would be due the taxpayer under this revised depletion computation which we have just discussed.

Q. And also included is the actual amount of refund after tax rates are applied, is that correct?

A. Yes.

Q. The result of pages 1, 2 and 3 of Exhibit No. 29 for identification, is that bags and bagging income and expenses have excluded and purchased materials, fluorspar and cinders, have been excluded——

A. Yes. [63]

* * *

Q. (By Mr. Enright): Now, Mr. Neuhauser, have you made a computation of the refunds allowable if bagging income and expenses and purchased materials, iron cinders and fluorspar, are included as a part of the depletion allowance computation?

A. Did you say “are included”?

Q. Are included, yes, sir.

A. Yes. [67]

Q. Where is that computation?

A. We have added it to this computation on page 2; the first column on page 2 which says “Claim for Refund.”

Q. I want you to consider my question.

Let me ask you another question: It is my belief that the original claim for refund, as filed, included the bagging and included the purchased material,

(Testimony of William E. Neuhauser.)

iron cinders and fluorspar, as being subject to depletion. A. Yes.

Q. Well, then, that computation would be in the original claim? A. Yes.

Mr. Enright: The original claim is in evidence already, counsel, as a part of Exhibit No. 5.

Q. (By Mr. Enright): Now, have you made a computation of the depletion allowance if bagging is included and purchased materials are included?

A. Yes.

Q. You have prepared such a report, have you?

A. Yes, there is such a computation.

The Court: Does the record show that "purchased materials" refers to the materials heretofore mentioned?

Mr. Enright: I will ask the witness.

Q. (By Mr. Enright): The "purchased materials" referred to in Exhibit No. 29 are iron cinders and fluorspar? [68] A. Yes.

The Court: That's true in each instance that you refer to it?

The Witness: Yes.

Q. (By Mr. Enright): In each instance in your entire testimony that is true? A. Yes.

Q. Now, have you the computation whereby bagging is included and purchased materials, iron cinders and fluorspar, are excluded?

A. No, I do not.

Mr. Enright: I ask that this document be marked next in order for identification.

The Court: It will be so marked.

(Testimony of William E. Neuhauser.)

The Clerk: Plaintiff's Exhibit No. 30, your Honor.

(The exhibit referred to was marked Plaintiff's Exhibit 30 for identification.)

Q. (By Mr. Enright): Was Exhibit No. 30 prepared under your supervision and direction, or by yourself?

A. It was prepared under my supervision and direction.

Q. What did you find the amount of depletion allowance to be at a 15 per cent of gross income rate?

A. \$1,274,069.03.

Q. And 50 per cent of net income limitation would result in what amount? [69]

A. \$433,772.97.

Q. Now, on this Exhibit No. 30 have you proceeded to run out the revised refund payable as has been done on Exhibit No. 29?

A. Yes.

Mr. Enright: I wish to offer Exhibit No. 30 in evidence as being another computation of a possible method of allowing depletion in this case.

The Court: The computations on Exhibit 30, as I understand it, excludes purchased material?

Mr. Enright: That would exclude purchased material.

The Court: That's iron cinders and fluorspar.

Mr. Enright: That is correct. Our objective is to place these figures before the court.

The Court: But including bagging.

Mr. Enright: But they include bagging.

(Testimony of William E. Neuhauser.)

The Court: Any objection?

Mr. O'Brien: No objection, your Honor.

The Court: Received in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 30, was received in evidence.)

Q. (By Mr. Enright): Now, can you by reference to Exhibit No. 29 compute the amount of depletion allowable if bagging is excluded and purchased materials are included?

A. Yes. That has been set forth on Exhibit No. 29. [70]

Q. Will you direct us to which page that is set forth?

A. The second page. The fourth column of figures from the left.

Q. That is at a 10 per cent rate——

A. \$817,620.95.

Q. And mathematically we can ascertain the 15 per cent rate on the gross income? A. Yes.

Q. What would be the net income limitation effect upon the depletion and the amount of depletion? A. \$628,820.89.

Q. And those are the figures that you have inserted in longhand on Exhibit No. 29?

A. That is correct.

Mr. O'Brien: Off the record, please.

(Discussion between counsel off the record.)

Q. (By Mr. Enright): Now, the net effect of excluding bagging and including iron cinders and

(Testimony of William E. Neuhauser.)

purchased materials is that the allowable refund is approximately some \$5,000 higher, is that right?

A. That is correct.

Q. And the amount of the refunded figure, for the record, would be what on this last——

A. I am sorry, Mr. Enright. Did you say the allowable [71] refund would be \$5,000 higher?

Q. Directing your attention to the point of excluding or including the purchased materials, iron cinders and fluorspar.

A. Yes.

Q. Dependent upon what the decision of the court, or anyone may be on that question of inclusion or exclusion, there is approximately \$5,000 difference in tax depletion allowance?

A. That's correct.

The Court: Some \$5,000 greater if the cost of purchased materials is excluded? Is that it?

Mr. Enright: Less if it is excluded; greater if it is included.

Am I correct?

The Witness: Yes. That is correct.

Mr. Enright: We can point out the figures at the appropriate time.

The Court: This is addition to cost?

Mr. Enright: We will explain it this way, by directing the court's attention to Exhibit No. 29.

The Court: Yes. As I understand, these iron cinders and fluorspar are purchased just like the bags and bagging is purchased.

Mr. Enright: Yes. And the way they are handled is this, [72] that the percentage of iron cinders

(Testimony of William E. Neuhauser.)

and fluorspar to total materials is ascertained. It was found to be .825 per cent.

The Court: I am not referring to the amount. I am just referring to what I understood you to say, that the opposite result is reached from excluding purchased materials than is reached when you exclude the bags and bagging.

Exclude the bags and bagging and the refund goes up. If you exclude the purchased materials it goes down. Is that it?

Mr. Enright: Yes. I think that is correct, and it arises out of this point that I was just going to——

The Court: Well, I just want to be sure that I understand the testimony as it comes in. It just struck me as being inconsistent.

Mr. Enright: I know. Nine per cent of the receipts has a different per cent than nine per cent of the expenses. That's where one's mind——

The Court: Well, wouldn't it have the same effect on bags and bagging as it would on purchased materials?

Mr. Enright: Well, it did not.

That is all on direct examination.

The Court: Any cross-examination of Mr. Neuhauser?

Mr. O'Brien: Yes, your Honor, I would [73] like to.

(Testimony of William E. Neuhauser.)

Cross-Examination

By Mr. O'Brien:

* * *

Q. On page 3 of Exhibit 29 you have "purchased material" listed there, and the tons used for cinders and fluorspar. And then I notice that under sub-note (2) you have "cost of bags used." And the amount is \$344,917.73.

I was curious to know why the cost of bags, being a purchased item, was used, and the cost of cinders and fluorspar, being a purchased item, was not used?

A. We made the computations under instructions to compute the expense of purchased material in this manner. [76] Our understanding from the attorneys was that this was the method used in the Dragon case, and this was the computation we were to make.

I might say that, and I believe it was in 1954 where there was no claim for refund, we did make a computation and determine the actual cost of purchased material, and that increased depletion allowance.

Q. And here you have used a tonnage ratio.

A. That's right.

Q. Of tons mined, tons purchased of raw materials.

A. Yes, that is correct.

Q. Does the 40 cent figure represent the cost of the bag alone?

A. The 40 cent figure is the amount added to the sale prices of cement when it is sold in bags. [77]

* * *

(Testimony of William E. Neuhauser.)

Cross-Examination
(Continued)

By Mr. O'Brien:

Q. Mr. Neuhasuer, directing your attention once again to the purchased material item and the mined material item that appears on page 3 of Exhibit No. 29. Do you know what the mined material item covers?

A. What the mined material item covers?

Q. Yes, sir.

A. Yes. The principal item is the limestone, Clay—I can't recall the others.

Q. Would the other be silica?

A. Silica. [81]

Q. If the clay was not allowed a percentage depletion allowance, do you believe it would be correct to exclude the clay from the mined material, which is here allowed, or presumed to be allowed, in the percentage allowance?

Mr. Enright: To which objection is made on the ground that it calls for a conclusion of law by this witness. The facts pertaining to that subject matter are the subject matter of a stipulation.

Mr. O'Brien: Your Honor, I am not asking for a conclusion of law. I said if clay is not allowed any percentage depletion, is it proper to include the clay within the mined material.

The Court: Well, it calls for his opinion, doesn't it?

(Testimony of William E. Neuhauser.)

Mr. O'Brien: Yes, sir. He has included it and if——

The Court: Well, what you are asking him, isn't it, is whether or not he didn't include it upon the assumption that it was allowable? Isn't that what you mean?

Mr. O'Brien: Yes, your Honor.

The Court: In that form I think it's admissible. He is an expert. You can test what assumptions he predicated his opinion upon.

Q. (By Mr. O'Brien): Will you please answer the question on the basis of your assumption?

The Witness: Will you restate it, please?

The Court: Including the clay, the cost of mining clay, [82] did you do that upon the assumption that there was a depletion allowance for clay?

The Witness: No. It was done under the direction of—that this was the method to be used, and this was the method used under the Dragon case.

The Court: As I understand, Mr. Neuhauser, you followed the method of computation which had been adopted in the Dragon case. Is that it?

The Witness: Yes, sir.

Mr. O'Brien: Well, you don't know whether you followed it or not, I understand——

The Court: That is his understanding.

Q. (By Mr. O'Brien): You were instructed that you were? A. Yes.

Q. Now, I am also going to ask you, as an expert witness in accounting matters and as a certified public accountant, one who works in the tax depart-

(Testimony of William E. Neuhauser.)

ment of Arthur Andersen, if the clay is not entitled to a depletion allowance, do you, in your expert opinion, believe it should be included in the mined materials that you have on your page 3 of Exhibit No. 29?

Mr. Enright: May we have the question re-read?

The Court: I don't see why you want to take up any time on that. If it isn't entitled to be included, it shouldn't be included, Mr. O'Brien. [83]

Mr. O'Brien: Thank you, your Honor. That's my conclusion, also. And I believe that the witness would affirm that.

The Court: Now, Mr. Neuhauser, as I understand it, according to his own understanding, followed the method which was employed in the Dragon case. Is that it?

The Witness: That's correct.

The Court: And if that's erroneous, why, his computation is erroneous.

And I am sure you would concede that, would you not?

The Witness: Yes.

Mr. O'Brien: Thank you. [84]

* * *

Q. Now, in setting up the 40 cents did you inquire as to what the 40 cents represented so far as the costs were concerned for bag cement?

A. What it represented as far as the cost of bag cement?

(Testimony of William E. Neuhauser.)

Q. Yes.

A. I am not sure I understand that. This is the additional charge for bag cement per barrel?

Q. Yes, sir.

A. I assume that is charged to recover costs.

The Court: You mean to recover administrative expense?

Mr. O'Brien: I wanted to find out if——

The Court: Referring to direct costs?

Mr. O'Brien: Direct costs, yes.

The Court: Did you understand that the 40 cent item—40 cents per barrel, wasn't it?

The Witness: Yes.

The Court: ——for bagging covered not only the direct cost of the bags but was an allocation of overhead?

The Witness: Well, ordinarily you wouldn't set the price in that manner. Competition pretty much determines what you charge. And, of course, you hope what you charge covers [87] all your costs and produces a profit.

Q. (By Mr. O'Brien): Well, here the 40 cents did not cover the costs. A. That is correct.

Q. Now, do you happen to know what the additional costs are?

A. You mean the cost that it does not cover?

Q. Yes, approximately.

A. In dollar amounts?

Q. Yes. A. \$381,769.85.

The Court: For what year?

The Witness: 1951.

(Testimony of William E. Neuhauser.)

The Court: That cost in fact as against cost estimated, would that reflect itself in the net earnings?

The Witness: Oh, yes.

The Court: It would be otherwise reflected.

The Witness: Yes.

The Court: This is just an arbitrary apportionment, this 40 cents, isn't it?

The Witness: Well, again, the 40 cents is the amount added to the sales price of a barrel of cement when it is sold in sack form instead of in bulk form.

Q. (By Mr. O'Brien): But the 40 cents is not intended to cover the cost, as you understand it, because of the loss [88] which is recorded here in the amount you have stated for the year 1951?

Mr. Enright: I will object to his understanding. What the facts are is what is competent, relevant evidence.

The Court: Is there any evidence on it?

The evidence is that it did not cover the cost.

Mr. Enright: Yes. And that is reflected——

The Court: Are you asking him whether he understood it, did cover the cost in making his computation, Mr. O'Brien? Is that your question?

Mr. O'Brien: Yes.

Q. (By Mr. O'Brien): In making up the computation you understood that the 40 cents did not cover the cost of bagged cement.

A. The computation showed that it did not.

The Court: The question is, when you made the computation did you understand that 40 cents did cover it?

(Testimony of William E. Neuhauser.)

The Witness: I had no understanding until we made the computations and found out they did not.

The Court: When you were making the computation did you assume that it did?

The Witness: Your Honor, I didn't make any assumption. I computed it and found out that it didn't.

The Court: Anything further?

Mr. O'Brien: Yes, your Honor. [89]

Q. (By Mr. O'Brien): Did you examine the books and records to determine if the 40 cent figure was a constant charge for the bagged cement?

A. Yes, we examined the books and records.

Q. They did not vary for the year that you examined? A. Not to my knowledge.

Q. And what years do you recall that you examined?

A. Well, we looked at a price list. And I have—I don't recall exactly what year that covered. And we also discussed it with the individual that had been in charge of this pricing in all of the years, 1951 through 1954. And it was his statement to us that this has been a constant practice during this period.

Q. Now, would you say that the bagged cement sales ending up with a loss of operation for the year 1951 of over \$380,000, that that loss had to be covered or carried by the sales of cement in bulk?

Mr. Enright: To which objection is made as incompetent, irrelevant and immaterial as to where the loss is covered or carried.

(Testimony of William E. Neuhauser.)

The Court: What difference does it make? The depletion is not computed on net profit, is it?

Mr. O'Brien: We are computing it here on net income, your Honor, 50 per cent of net income, or 10 per cent, the Government claims, of gross. [90]

The Court: Still, wouldn't it be immaterial? It would reflect itself somewhere, wouldn't it?

Mr. O'Brien: Well, that is what I wanted to find out, where else it should reflect itself.

The Court: Well, can you tell us, Mr. Neuhauser?

The Witness: You say where else it should reflect itself?

Mr. O'Brien: Yes.

The Witness: I don't understand what you mean.

The Court: Well, in breaking it down, if you allocate 40 cents to the cost of bagging and it is insufficient, it doesn't cover the actual expense of bagging, where would the differential appear in the records of the company.

Is that your company?

Mr. O'Brien: Yes, your Honor.

Mr. Enright: To which objection is made is this: That the statute is, depletion from the property and the property is defined as "mining." And the method of computation is the processed steps in the mining.

And he is asking about "Where are you going to carry a loss, in some other range operation, oxide operation, or any other thing the corporation does?" It's immaterial.

(Testimony of William E. Neuhauser.)

The Court: Well, it might not be material. It depends on whether or not that is included in the mining operation. Isn't that the determinant? He has to determine that first, [91] we haven't determined that. Overruled.

Mr. Enright: That is for the court, as a matter of law, to determine, not for the accountant to determine whether he is going to put this bagging some place else, loss or receipt.

The Government's position has been—it seems to be—that the whole bagging receipt and expense be excluded as a matter of law. We stand on that position.

The Court: What? On the 40 cent basis or the actual basis?

Mr. Enright: Both the 40 cent receipt and the actual expense are to be excluded. That we understand to be the Government's position. We agree with them. It has nothing to do with the mining, under this statute.

Mr. O'Brien: The taxpayer wants the Government to assume that its accounting methods are consistent with the mining operation. Now, a taxpayer, with Exhibit——

The Court: Do you contend that bags and bagging should be included?

Mr. O'Brien: Your Honor, I am only trying to inquire——

The Court: No. Answer that question, and then we can talk. I am not interested in some academic theory. I am interested in the real controversy.

(Testimony of William E. Neuhauser.)

If the Government doesn't contend that this should be included, if you are both agreed upon it, let's drop the [92] subject.

Mr. O'Brien: Well, in principle, the Government would agree with the theory——

The Court: All right. Let's drop the subject. Step down, Mr. Neuhauser. Call your next witness. Let's move on.

Unless you have something more?

Mr. O'Brien: Well, if the witness would stay here for a second, your Honor, and let me please try to explain the problem as we see it.

We have an over-all operation of this cement business, where the loss on the bagging operation, taxpayer wants to exclude as non-mining cost all of the costs on the non-mining cost basis. Therefore, he is increasing his percentage depletion allowance by eliminating this cost.

The Court: Yes. But you are agreeing with him.

Mr. O'Brien: In principle.

The Court: If you dispute it, why, then let's talk about it. There is something to talk about. But if you agree with him, let's move on to something else.

Mr. O'Brien: Well, in principle, your Honor, yes. But is it not a valid point of inquiry to determine if it is not in truth the bulk sale of cement which is carrying the balance of this loss which they are attributing to bagging.

Therefore, if the bulk commodity is carrying part of this cost, if this is non-mining cost, it should come out [93] from under the cost——

(Testimony of William E. Neuhauser.)

The Court: Well, I assume, Mr. O'Brien, if you agree with Mr. Enright you will add whatever the loss is onto what would otherwise be the net profit figure, and then there is no dispute between you.

Of course, if it came out of something else and it changed the figures, if there was disagreement between you on it I could see some basis. Unless you are going to dispute the net profit figures on some other ground.

Mr. O'Brien: That is what I am trying to determine, your Honor. I think that there is a dispute between us on a net profit figure that they have arrived at.

The Court: But is it because of this bag and bagging expense? As I understand it, they got 40 cents per barrel of cement for bagging, bags and bagging. It cost a great deal more than that. They have estimated what that cost is.

Do you dispute the 40 cents?

Mr. O'Brien: No, your Honor.

The Court: Do you dispute their estimate of how much it cost them more than 40 cents?

Mr. O'Brien: No, your Honor.

The Court: Well, then, what is there to argue?

Mr. O'Brien: I want to try to determine if it is not true that the price they charged for the bulk cement includes a certain amount of money to cover the loss on the bagging [94] operation which is not covered by the sale of the bagged cement.

The Court: Well, now, what difference would

(Testimony of William E. Neuhauser.)

it make? It might make a lot of difference to the customer of bulk cement.

Mr. O'Brien: That's right.

The Court: But it wouldn't make any difference to anybody else.

Mr. O'Brien: The customer of bulk cement is carrying, in part, the cost of bag sales.

The Court: All right. He isn't here.

Mr. O'Brien: Pardon?

The Court: He isn't here.

Mr. O'Brien: But might we not argue, as a matter of accounting, under the principle we are advocating here, that the portion of the income from the sales of bulk cement which is intended to cover the balance of the loss operation on bag sales should be excluded from their gross income on bulk sales?

In other words, what is the real price of bulk cement.

The Court: Would it make any difference here? It would be six of one and half a dozen of another, wouldn't it?

Mr. O'Brien: It would make a substantial difference.

The Court: When it comes to computing net profit.

Mr. O'Brien: It would make a substantial difference, [95] your Honor, because they are taking out all of the balance of the loss.

The Court: And you agreed to it.

Mr. O'Brien: And we want them to take part.

(Testimony of William E. Neuhauser.)

We want them to take the balance of that loss from the bulk cost.

The Court: What difference does it make? Isn't it just six of one and half a dozen of another?

Mr. O'Brien: As a practical matter, your Honor, it makes a difference in the amount of their depletion allowance. It reduces it, your Honor, the depletion allowance.

The Court: I don't see how it could. It wouldn't change the net profit figure, would it?

Mr. O'Brien: Yes.

The Court: How could it? I am assuming you have agreed to the method of eliminating not only the 40 cent income but also eliminating the entire cost of bags and bagging. It's just taken out of the picture, the profit picture just the same as if it never happened, isn't it?

Mr. O'Brien: Well, maybe we don't agree that the entire cost of bagging, the operation of bagging which is the cost of loading cement in bags, should be taken out.

The Court: Well, are we taking up all this time over some question you want to ask him?

Mr. O'Brien: Pardon me?

The Court: You say maybe you don't agree. Don't you [96] know?

Mr. O'Brien: Well, we are trying to explore through an expert, a certified public accountant, if he thinks, as a matter of accounting procedure, if it isn't true that the bulk price for cement necessarily has an included differential to cover the loss.

(Testimony of William E. Neuhauser.)

The Court: You mean consciously included, or consciously or unconsciously?

Mr. O'Brien: It would have to be consciously included.

The Court: Do you know whether the company added anything to the price of bulk cement to make up for this loss of bags and bagging?

The Witness: No.

Q. (By Mr. O'Brien): Is there any way of determining from their books and records whether they added anything to the price of bulk cement?

A. I don't think so.

Q. Would it be a legitimate method of accounting to take out from the price of bulk cement that amount of money which would cover the loss operation, the balance of the loss operation on bagged cement?

Mr. Enright: I will object to what is legitimate method of accounting practice.

The Court: Well, he means proper accounting practice.

Do you understand the question? [97]

The Witness: No.

The Court: I didn't understand it, either. But I thought perhaps Mr. Neuhauser did.

Q. (By Mr. O'Brien): In proper accounting practices, how would you arrive at the amount of money which is charged for bulk sales that is intended to cover the balance of the loss operation on bagged sales which is not covered by the price of bagged cement?

(Testimony of William E. Neuhauser.)

A. I would determine from the client's records and discussions with the client if there is any addition to the price of bulk cement which is intended to cover such loss. If I establish that there is such an addition, then there must be evidence of it on the records and it will be easily determinable.

Q. Do you think, within accounting procedures, that it would be proper if the client asked you to set it up as a method on their books, what portion of the bulk price would be allocated to cover the loss, and how would you do that?

A. Well, if we were accounting, Mr. O'Brien, for departments and profitability of departments, I wouldn't take the income of one department and apply it against the loss of another department. The purposes of departmental accounting would be to see what departments are producing income and what departments are producing a loss. So, I [98] wouldn't ordinarily be doing what you suggest, apparently, taking the income of one department and applying it against the loss of another department.

Q. Would that not be proper procedure for accounting then? A. No.

Q. It could be done, but you wouldn't recommend doing it? A. No, I wouldn't

The Court: He said, according to his opinion, it is not proper accounting practice, as I understand it. Is that correct?

The Witness: That is correct.

WALDO A. GILLETTE

called as a witness by the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: What is your full name, please?

The Witness: Waldo, W-a-l-d-o, A. Gillette, G-i-l-e-t-t-e.

Direct Examination

By Mr. Enright. [102]

* * *

Q. Can you state what was the practice in 1951 of these cement companies with which Monolith competed concerning price differential, if any, between bulk cement on the one hand and sack cement on the other hand?

A. The price of sack cement was 40 cents a barrel above the price of bulk.

Q. Does this Exhibit No. 32 reflect that differential, plus the freight rate differential, at the various, destinations, insofar as there was freight rate differential, between sack cement and bulk cement?

A. Yes.

Mr. Enright: I wish to offer in evidence Exhibit No. 32.

The Court: Any objection?

Mr. O'Brien: No objection, your Honor. [107]

The Court: Received in evidence.

(The exhibit referred to marked Plaintiff's Exhibit 32, was received in evidence.)

Mr. Enright: Counsel has stipulated—I will attempt to state it accurately—that I may read from a portion of the Riverside Cement Company price

(Testimony of Waldo A. Gillette.)

list which bears the date, May 15, 1950. And that portion is as follows:

“Prices for Portland cement in bulk will be 40 cents per barrel below the prices for such type of Portland Cement in paper sacks.”

Q. (By Mr. Enright): Now, directing your attention, Mr. Gillette, to what I have just read concerning the Riverside price list, is that the competition that Monolith Company met or attempted to meet in marketing its product in Southern California?

A. That is correct.

The Court: By that you mean that Monolith couldn't charge more than 40 cents per bag and bagging per barrel because your competitors did not charge more than that?

The Witness: That's right. We can't get any more for our cement than anybody else can.

Q. (By Mr. Enright): Now, directing your attention to the Riverside Cement Company plant at Crestmore, California, Riverside County, do you know whether or not its freight rates published under the authority of the Public Utilities [108] Commission and Interstate Commerce Commission are any different from the freight rates from Monolith to Los Angeles metropolitan area?

A. Yes, they are.

Q. What is the difference? Not in dollars or cents, but are they higher or lower?

A. The rates from Riverside are lower than from Monolith.

Q. What is the approximate mileage from Crest-

(Testimony of Waldo A. Gillette.)

more, California, on the one hand, to the Los Angeles metropolitan area and Monolith, California, on the other hand, to the Los Angeles area?

A. Riverside is approximately 57 miles, and Monolith is approximately 116 miles.

Q. That is both rail and truck, or highway miles?

A. Those are the rail mileages. The highway mileages are approximately the same as that.

Q. Now, in addition to the Riverside Cement Company's plant at Crestmore, is there another cement plant closer, in closer proximity to the Los Angeles market than the Monolith plant?

A. Yes, there is a plant at Colton, California, owned and operated by the California Portland Cement Company.

Q. And it is just a few miles from the Crestmore plant of the Riverside Cement Company? [109]

A. Yes, it is. And approximately the same mileage to Los Angeles.

Q. Does the California Portland Cement Company at Colton enjoy an equality of freight rate structure with the Crestmore plant in the Los Angeles market? A. Yes.

Q. What is the principal consuming market for the marketing of Portland cement, either in sacks or bulk, so far as the cement plants in Southern California are concerned?

A. The Los Angeles area. [110]

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(Testimony of Waldo A. Gillette.)

Cross-Examination

By Mr. O'Brien: [111]

* * *

Q. (By Mr. O'Brien): The principal market that Monolith has is for bulk sales, according to your Exhibit No. 31. Is that true?

A. Yes. In 1957 our shipments were 76.87 per cent bulk.

Q. And for the year 1951?

A. 63.49 per cent bulk.

Q. And what were the percentages for bagged cement [119] for the year 1951?

A. Well, the difference, which would be 36.51 per cent.

Q. And for the year 1957?

A. 23.13 per cent.

Q. For the cement industry that comprises your competitors that you previously described, are your percentages fairly representative of the market conditions?

A. Yes, I think they are. Because if you will note, most of the construction nowadays is furnished by transit mix dealers. Now, your transit mix people receive cement in bulk. And so, all of the cement that is sent by transit mix—all the concrete that is sent by transit mix has been previously shipped to that dealer in bulk. They do it because of the ease of handling, reduction of cost.

And, of course, your labor costs are playing

(Testimony of Waldo A. Gillette.)

quite a factor in it, now. There was a time when we handled things by hand, but it just—nowadays most everything is handled in bulk, as far as you can. [120]

* * *

KENNETH H. PILKENTON

called as a witness on behalf of the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: Will you state your full name, please?

The Witness: Kenneth H. Pilkenton. [121]

* * *

Cross-Examination

By Mr. O'Brien: [125]

* * *

Q. (By Mr. O'Brien): And with respect to the warehouse operations, would you describe that for us?

A. Monolith Cement Company hauls mostly by rail, bulk cement, down to various distributing centers and then it is reloaded into bulk trucks and then sends it out to the trade. That is a process or expense or service beyond the point of manufacturing the bulk cement. [129]

* * *

The Court: Did you assume that bags and bagging were part of the cost of mining?

(Testimony of Kenneth H. Pilkenton.)

The Witness: I have never thought so, that bags and bagging were a cost of mining. [130]

* * *

The Court: It seems to me that it is just a question as to whether certain items would be included or excluded.

You agreed on the bags and bagging. That can be taken out, can't it?

What about the purchased material, iron cinders and fluorspar?

Mr. O'Brien: Those should be taken out, also, I believe. Or, plaintiff has taken that out of the computation.

The Court: Is that agreed by the plaintiff, that those go out?

Mr. Enright: If that's the only issue, why, I am sure I can agree that they be taken out. In principle I do not think they should be, but if that's the only point the Government has, why——

The Court: I am not suggesting a ruling one way or the other.

As I understand the ruling in these cases, it is that you take X out of the ground and if it's marketable the [141] way it comes out of the ground, why, that's the price, the price at which you market it in that condition. That is what we are interested in. If you have to do something to it to make it marketable, whatever you have to do to it, add to it or change it, whatever the cost of that is goes into the selling price.

Somewhere along the line you can cut off this process and you can market it.

Now, as I understand it, you are in agreement that that can be done short of the bagging of it. So, it's sold on bulk.

As I would understand it, you would take the cost of what it would take to produce that cement and sell it in bulk, and that would be what you would deduct. And, of course, you would deduct it from what you get for it sold in bulk.

That may be an over-simplification, but it seems to me that the result would be the statutory income from the property from mining.

Mr. O'Brien: Yes, your Honor. I believe you are correct in the matter. I don't wish to argue what we have raised here with respect to the loss operations, but——

The Court: It seems to me that you would just lay that completely outside, if you disregard the bags and bagging. [142]

Of course, you may have to do some arithmetical computations to eliminate it. I don't know what the bookkeeping has been. It seems to me that to arrive at this you would start with the sale of it as sale in bulk. That's the gross. And deduct from it the cost of bringing it up and selling it in bulk, whatever that may be. If you have to add iron cinders to it, it seems to me that would be. And fluorspar. Whatever is necessary to make it marketable, a marketable mineral product. [143]

March 24, 1958, 10:50 A.M.

* * *

The Court: The question is, will the bagging stage be included, or is the cut-off point at which the cement becomes [171] marketable short of the bagging stage? And you have agreed that it is. Both sides have agreed that it is.

Mr. O'Brien: Yes.

The Court: And it so happens that by so agreeing in this situation the figures on the books are such that it causes this loss and that it adversely affects the Government when dealing with those figures.

* * *

[Endorsed]: Filed June 25, 1958. [172]

PLAINTIFF'S EXHIBIT No. 3

Exhibit "H"

Los Angeles District
Engineer's Report (Mining)

August 10, 1953.

Taxpayer

Monolith Portland Cement Co.
Los Angeles, Calif.

Address

Manufacturer of cement. Raw products and
plant located in Kern County, California

Authority for examination: 1951 return

	1951
Percentage depletion claimed	\$119,121.37
“ “ allowed	109,244.28
Depreciation claimed	246,291.74
“ “ allowed	246,291.74

Depletion for the year involved is determined in accordance with provisions of the Revenue Act of 1951.

Depreciation is allowed at rates claimed they being consistent with those claimed and allowed in settlement of prior years return.

Depletion claimed on the percentage of income basis is allowed in the “costs and proportionate profits” method not on income received from sale of finished cement. Per schedule “A” attached note that calculation is at the rate of 10% of gross computed limerock income, at 5 per cent on clay and tufa (stone) and nothing for silica all subject to the limitation of 50 per cent of net computed income on each. All of the above-stated minerals are used in the manufacture of cement.

Proportionate costs have been broken down into:

(1) Direct and indirect expenses through the raw grind process,

(2) Direct and indirect expenses after the raw grind process in order to eliminate depletion on manufacturing profits.

Further allocation of expenses before and after raw grind has been made with respect to selling and general administrative.

The direct and indirect expenses up to raw grind are shown in detailed cost records by minerals. Direct and indirect expenses of raw grind have been allocated to the four minerals on the ratio of tons of each processed to total tons processed.

Total direct and indirect expenses of \$1,834,624.41 (through raw grind) have been determined to be and allocated:

Limestone	\$1,678,197.61	—	91.47%
Clay	95,732.21	—	5.22%
Tufa	36,264.77	—	1.98%
Silica	24,429.82	—	1.33%
	<hr/>		<hr/>
	\$1,834,624.41	—	100.00%

Selling and general administrative expense allocations follow the scheme of charging each mineral in the same manner as direct and indirect expense.

Total direct and indirect costs through raw grind—\$1,834,624.41—is 35.74 per cent of the total of all such costs—\$5,131,983.93—through the furnished product. Thus 74.26 per cent of the total cost relates to manufacturing expense, i.e., after raw grind.

Depletion claimed in the amount of \$119,121.37 is allowed at \$109,244.28 the adjustment being through increase made in general and administrative expenses (see Schedule A attached) which decreases net income with the result the 50 per cent limitation on computed limestone net income is affected.

Depletion claimed and allowed on clay and tufa is not affected due to allowance of the 5 per cent gross income rates.

The adjustment in "mining" net income is due to increase in General and Administrative expense by disallowance of other income (interest, etc.) and miscellaneous items which were charged on schedule attached to the return as a reduction of costs. For detail see Schedule B attached.

Cost depletion is not allowed on silica production due to unsubstantiation of a unit rate.

The taxpayer agrees to adjustments noted.

W. W. HANSON,
Valuation Engineer.

Reviewed: 8/18/53

ESB

Approved:

/s/ D. W. WILLIAMS,
Chief, Natural Resources
Section.

Exhibit No. 2 to Stipulation of Facts No. 1.

Received for identification January 23, 1957.

PLAINTIFF'S EXHIBIT No. 14

Uses for Which Chemical Properties
Are Most Important

Cement Manufacture

Limestone is the chief raw material used in making portland cement. Although pure limestone is not required, constancy in chemical composition is desirable. The general requirements are: (1) The stone should be free of concretions rich in iron minerals; (2) the silica and alumina contents should be sufficiently low and in such proportions that they will not interfere with the desired silica-alumina ratio in the finished product; (3) the magnesium content should be low enough that the finished product will not contain more than 5 per cent magnesia (MgO); (4) the content of iron should be low enough that the ferric oxide content of the cement does not exceed 4 per cent; (5) the sulfur content should be low.

Cement rock is an argillaceous limestone that contains enough clay as it occurs in nature to adapt it for the manufacture of cement. Sometimes it may be necessary to adjust its composition by adding small quantities of either high-calcium limestone or clay.

* * *

Few extensive limestone deposits comparable with those in many of the Eastern states occur in California. Most of the deposits in California are

irregular bodies of variable magnesium content. Limestone deposits that are available are used extensively in the more populous areas. Cement manufacture is an important industry, particularly in the Los Angeles area where several large plants operate in San Bernardino, Riverside, Los Angeles, and Kern Counties.

* * *

Exhibit F to Stipulation of Facts No. 2.

Received for identification.

PLAINTIFF'S EXHIBIT No. 15

Rocks composed predominantly of the mineral calcite are called limestone; those in which the mineral dolomite predominates are called rock dolomite or simply dolomite. Pure limestone, which is rare, contains 100 per cent CaCO_3 . Rocks composed of mixtures of calcite and dolomite or rocks composed of carbonate minerals transitional between calcite and dolomite are called magnesian limestones. In general, limestones, dolomites and magnesian limestones cannot be used inter-changeably and economic utility of these rocks must be judged by their chemical and for some uses, physical characteristics. Most commercial limestone contain more than 95 per cent CaCO_3 and less than 5 per cent MgO_2 although rock of lower CaCO_3 content is sometimes used—particularly for portland cement. Limestone containing

more than 95 per cent CaCO_3 is commonly referred to as high-calcium limestone.

* * *

Occurrences of Limestone and Dolomite in California

Most of the limestone and dolomite deposits in California occur in metamorphosed marine sedimentary rocks that have been strongly deformed. Most commonly they are found in rocks of Paleozoic age but there are some commercial deposits in rocks of Mesozoic age and a few are found in pre-Cambrian suites of rocks.

* * *

In many terranes of crystalline metamorphic rocks the carbonate units have been so intimately folded with rocks of non-carbonate nature, such as slate, schist and quartzite that beds which originally would have been of economic value are now too thoroughly intermixed to be profitable to mine.

* * *

Marketing of limestone, dolomite and lime products

Limestone and dolomite are both low-priced commodities which must be produced reasonably near to centers of consumption or transportation costs become prohibitive. With but few exceptions, limestone and dolomite are produced within 150 miles of the consuming center.

* * *

Exhibit G to Stipulation of Facts No. 2.

Received for Identification.

PLAINTIFF'S EXHIBIT No. 23

DEPOSITION OF DR. OLIVER BOWLES

Voir Dire Examination

By Mr. Enright:

Q. Is the word, Chemical Grade Limestone, used in the glass industry, to your knowledge? That phrase, Chemical Grade Limestone. Is it used in the glass industry? A. I don't know.

Q. You don't know? A. No.

Q. Is it used in the paint or whiting business?

A. I am not conversant with the personnel of those industries enough to know how to use the term.

Q. Is it used in the varnish industry. That is, that phrase, Chemical Grade Limestone?

A. I don't know.

Q. Is the term or phrase, Chemical Grade Limestone, used in the paper industry?

A. I don't know whether they use it or not.

Q. Is the phrase, Chemical Grade Limestone, used in the alkali industry?

A. I don't know.

Q. Is the term or phrase, Chemical Grade Limestone, used in the sugar industry?

A. I don't know.

Q. Would your answer be the same as to any industry where limestone is chemically processed? [7*]

A. Yes, my answer would be the same, because I am not conversant with the personalities and

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Deposition of Dr. Oliver Bowles.)

people in that industry. I never heard them talk about such things.

Q. Now, directing your attention to the Bureau of Mines where you spent thirty-five years, was the term, Chemical Grade Limestone used in any of the publications that you offered for the Bureau of Mines?

A. I know I used the term, Chemical and Industrial Uses, quite frequently.

Q. And you used the term, Chemical and Industrial Uses with reference to the use of limestone in the following industries, relating them as to volume of limestone used:

First, cement; second, lime; third, alkali; and approximately seven or eight other similar uses of limestone where it was chemically processed, did you not?

A. I don't think I used that term in that way.

Mr. Enright: I submit there is no qualifications of this witness to testify concerning the use of the phrase, Chemical Grade Limestone. He already testified the only use he made of it is in uses in which the chemical properties of the limestone are important.

Mr. O'Brien: May I continue with the witness?

Mr. Enright: Surely.

(Deposition of Dr. Oliver Bowles.)

Examination by Counsel for the Government
(Continued)

By Mr. O'Brien: [8]

Q. You stated on the qualifying questions of Mr. Enright you were not familiar with the personalities of persons in these various industries he named, as to whether they themselves, used the term, Chemical Grade Limestone. A. Yes.

Q. Yes? A. Yes.

Q. Have you ever heard the term, Chemical Grade Limestone, used in the limestone industry?

A. Do you mean by the producers themselves?

Q. Yes.

A. I cannot recollect at this time, no.

Q. Is the term, Chemical Grade Limestone a term which is unknown to the limestone industry?

Mr. Enright: I submit that this witness is not qualified or competent to draw that conclusion.

Mr. O'Brien: Please answer.

Mr. Enright: There is no foundation laid.

The Witness: It is a term that the industry is well acquainted with, I am sure.

Q. Well, would you explain why you believe that the industry is well acquainted with the term?

A. Because they sell stone to the industries that use the high grade chemical stone, that is required in their processes. [9]

Q. Well, do they grade limestone?

A. Yes.

Q. If the purchaser desired to purchase a chemi-

(Deposition of Dr. Oliver Bowles.)

cal grade limestone, would a producer of limestone generally understand what was meant?

A. I think he would. Yes.

Q. Well, what sort of limestone would be included, then, within the term, Chemical Grade Limestone?

A. As we interpret it, in the Bureau of Mines, a chemical grade limestone is one that is used for chemical uses such as alkali manufacture, calcium carbide manufacture; in the glass, paper, and sugar industries.

Q. How pure should the limestone be for such uses?

A. In general, it means just from 96 to 98 per cent carbonates or even higher ranges, in some instances.

Q. Would you consider a limestone containing about 85 per cent calcium carbonate a chemical limestone?

Mr. Enright: I object.

The Witness: No.

Mr. Enright: Just a minute. I object. I want the record to show, before the answer is given, there is no qualifications shown by this witness to qualify him to state that conclusion that he has just made in response to your question. If you desire to lay any further foundation, I would appreciate your doing it, because at the appropriate [10] time, I will move to strike the answer.

The Witness: May I have that question read?

(Thereupon the pending question was read.)

(Deposition of Dr. Oliver Bowles.)

The Witness: May I answer?

Mr. O'Brien: You have already answered it.

The Witness: No, I have not.

Q. Would you explain why you would not consider a limestone containing 85 per cent calcium carbonate as not a chemical grade limestone?

A. Because it is impure for the uses that I enumerated as constituting what we understand to be the chemical industries.

Q. Would you consider the Portland Cement Manufacturing industry as one of the chemical industries?

Mr. Enright: I further object for the same reason, to the whole line of testimony of this nature. If you desire to lay foundation to qualify the witness, I request you to do so.

The Witness: I would not consider the Portland Cement Industry as a chemical industry, as the term is understood in the Bureau of Mines.

Q. Is there a chemical reaction in the process of cement manufacture?

A. Yes. There is complex chemical reaction which takes place. [16]

* * *

Mr. Enright: Now, perhaps the taxes have a little bit to do with it, would you say? Maybe that is what the witness has in mind in his conclusion.

Q. Are these publications looked upon as authoritative publications by the industry from your knowledge of the vast number of years you have been in this field?

(Deposition of Dr. Oliver Bowles.)

A. I believe they are so recognized. Yes.

Q. Would you consider a limestone used for lime manufacture as a chemical limestone?

A. Yes. I would.

Q. Why would you do so, when you rule out limestone for cement manufacture?

A. Because limestone used for lime manufacture is generally, or almost invariably, a very high grade. A large part of the lime manufactured in the United States is made from stone running more than 98 per cent calcium carbonate. In fact, the lime itself is a very important chemical raw material.

Q. And you state chemical raw material. Do you mean as used by the chemical trades?

A. Yes. It is used extensively in making glass, paper manufacture, sugar manufacture.

Q. What ratio of purity must there exist in the limestone to make a chemical grade lime? [17]

* * *

The Witness: Well, I might amplify it to this extent, to say that limestone itself is not used for treating sewage and trade waste. Lime made from limestone is so used, and therefore, taxpayer's limestone could not be used for such a purpose because it is not suitable for making lime.

Q. The lime industry is one of the recognized chemical trades? A. Yes.

Q. What about the use of limestone by leather manufacturers?

A. That requires a high calcium stone.

Q. Could taxpayer's limestone be used by leather

(Deposition of Dr. Oliver Bowles.)

manufacturers? A. No. No.

Q. Could taxpayer's limestone be used for water purification?

A. There again, it is not stone that is used. It is a lime that is used. Therefore, the taxpayer's stone could not be used in water purification.

Q. Could taxpayer's limestone be used in petroleum refining?

A. No. That requires a high calcium stone.

Q. Do you think any of these industries, despite what you have here testified as the View of the Bureau of Mines, would still use taxpayer's limestone in any of these categories?

A. I cannot answer that. We covered that all in detail. I cannot give you an overall answer because I think there are one or two there, in which they could use it. [26]

* * *

Q. I will refer to your own views. I think they are quite qualified.

Mr. Enright: That is this witness' own personal views.

The Witness: Well, my views are based on thirty-five years' experience with the industry, which neither the secretary nor the Director of the Mines have had and my conclusion would be that the taxpayer's limestone is not useable in the chemical industries as I have defined them.

Q. Do you know of any other authoritative industries or government publications that would classify the cement industry as one of the chemical trades?

(Deposition of Dr. Oliver Bowles.)

A. No. I don't know of any such publication.

Mr. Enright: I assume he refers to the trades you just previously defined?

The Witness: Yes.

Q. Would you please explain the processes for the preparation of limestone for cement manufacture?

A. Well, the limestone is crushed and ground to a fine powder. It is properly proportioned with clay and other additions to make a suitable mixture.

Q. And what is the next step after you obtain the [27] suitable mixture?

A. These finely ground materials are calcined in a rotary kiln. During the process, complex reactions take place, forming calcium silicates; calcium aluminates; ferrites; and other compounds. The limestone is entirely changed into these products. The material comes from the kilns in small lumps called clinker, which we grind to a powder.

Q. I show you Stipulation of Facts No. 1 entered into by the parties, and filed with the Court where, in Paragraph IV, it narrates the steps in the preparation and physical proportioning of the raw materials. And I would like to have you state if you agree with that. Is that paragraph accurate according to your information of the cement industry?

A. According to my understanding, that statement is correct.

Q. Would the processes of crushing, grinding, and screening prepare the limestone for use in a marketable form?

A. Yes.

(Deposition of Dr. Oliver Bowles.)

Q. What are the marketable forms for limestone in the United States, generally?

A. Well, it is sold as a crushed stone, screened to various sizes in larger masses called rip-rap or pulverized to a fine powder.

Q. Are you placing pulverized limestone in the category [28] of a stone? A. Yes. [29]

* * *

Q. That is under the general classification, uncalcine, [54] isn't that correct, in your own statement there, of 1927?

A. That is a principal classification.

Mr. O'Brien: Is there any objection to having the witness read into the record, for the benefit of the Court, what it is he is referring to and what you are referring to?

Mr. Enright: None whatsoever.

Mr. O'Brien: Would you please read it in the record?

The Witness: I thought it was in the record already.

Mr. O'Brien: No. The quotation, please.

The Witness: Four general fields of utilization may be outlined for commercial limestone.

1. As uncalcine stone. Dimension stone. Crushed or pulverized stone.

2. As flux or for other metallurgical purposes.

3. In the manufacture of Portland Cement.

4. In the manufacture of lime.

For the first of these uses, the chemical composition of limestone is of little significance, and its

(Deposition of Dr. Oliver Bowles.)

physical properties are of most importance. For fluxing purposes or the manufacture of Portland Cement or lime, the chemical composition of the stone is all important. Its physical properties are secondary.

Q. Now, directing your attention to the commercial [55] use of limestone for flux or metallurgical purposes, physical properties are of importance, in addition to the chemical properties in that instance. Is that correct?

A. No. No. Physical properties are of minor importance for flux or metallurgical purposes. [56]

* * *

Q. When you wrote your text, published by McGraw Hill Company, you treated cement production as the first subject to be discussed under the topic, Uses for Which Chemical Properties Are Most Important, did you not?

A. What page is that?

Q. 385. A. Yes.

Q. You so discuss cement at that time, because it was the most important chemical user of limestone. Isn't that correct, Doctor?

A. Well, I would not word it just that way.

Q. But substantially, that is correct, is it not?

A. It is the most important of the products made from limestone.

Q. Tonnage wise and dollar wise, isn't that correct?

A. I think that is correct. Yes.

Q. And in fact, the chemical reactions occurring

(Deposition of Dr. Oliver Bowles.)

in the kilns are so complicated that the chemists are not quite sure just what the symbols are for the chemical compounds that is formed in the kiln, is that correct?

A. I think that is correct, yes.

Q. Have you read Dr. Bogue's treatise on the subject matter?

A. Yes. I know Dr. Bogue, and I know he has had [60] ten men working for him for the last twenty years on Portland Cement.

Q. He is the authority in the field, is he not?

A. On the process of making cement, yes.

Q. Well, you read and studied his book, *The Chemistry of Portland Cement*, published by the Chemical Publishing Company?

A. Yes. I know his book.

Q. It is a chemistry book, is it not, on cement?

A. Yes, that is right.

Q. Published by a chemical publishing company, isn't that right?

A. It is a chemical reaction, yes.

Q. And it is published—the treatise upon the subject matter—by a chemical publishing company?

A. Yes.

Mr. O'Brien: If he knows. Do you know the publishing company?

The Witness: Yes, I know the Chemical Publishing Company.

Mr. O'Brien: What is the name of it?

The Witness: That is the name of it. Chemical Publishing Company.

(Deposition of Dr. Oliver Bowles.)

Q. And so, Dr. Bogue's predecessor, I believe, was a Dr. Meade, is that right? [61]

A. Meade on Portland Cement. Yes, I know his book, too.

Q. And that is considered the prior authority before Dr. Bogue published his book. Isn't that right?

A. I think so. Yes.

Q. In addition to the Bureau of Mines classifying cement as a mineral product, it is also true that the Bureau of the Census did likewise, during the years 1899 to 1937, is it not?

A. I suppose you are referring to the Census of the Mineral Industry?

Q. Well, I am referring specifically to your own publication in May of 1945.

That is why I carried the date down to 1937, because your writings as of that time is my knowledge on the subject. I have nothing further than that, personally, into the Bureau of Census, but I am endeavoring to develop the subject now through you preliminarily to go in later, if necessary.

If it will refresh your recollection, I will show you a quotation from your publication, U.S. Bureau of Mines, Information Circular 7320, May, 1945, Trends in Consumption and Prices of Chemical Raw Materials in Fertilizers, by Oliver Bowles and Ethel M. Tucker, being a quotation from page two: [62]

"It is difficult to measure the output of the chemical process industry, because some doubt exists as to just what industries should be included. Many

(Deposition of Dr. Oliver Bowles.)

industries not classified strictly as chemical, employ chemical processes. Chemical and metallurgical engineering has presented a table based on Bureau of Census figures for the value of output of the chemical processing industry for select years from 1899 to 1937. These data with the additional figures for the 1937-1939, appear in Table One. Figures for years later than 1939 are unavailable.

“The industries covered are as follows:

“Chemicals. Coke oven products. Drugs and medicines. Perfumes. Cosmetics and toilet preparations. Distilled liquors. Explosives and fire works. Fertilizer. Glass. Clay products and refractories. Pottery porcelain and sand lime brick. Leather panning. Lime and cement.”

I shall not continue to read the additional enumeration, but ask you whether or not that refreshes your recollection as to whether or not lime and cement were included in the chemical industries as stated in this bulletin?

A. Yes. It is included in this classification by the Census, but you will note in the introductory paragraph I qualified it by saying that many industries not classed strictly as chemical, employ chemical processes. [63]

Q. That was your then-thinking on the subject?

A. It is my thinking now.

Q. And you therefore——

A. That is why I classed cement in that group. It does employ chemical processes but that does not make it a chemical industry.

(Deposition of Dr. Oliver Bowles.)

Q. You therefore——

A. As we understand it.

Q. You disagree with the Bureau of Census Classification, do you?

A. I qualified it, yes, in the beginning.

Q. You disagree with it by your qualification. Is that correct?

A. I don't see how I can disagree with it. They include certain industries and they say they are covered.

Q. You also disagree with the Bureau of Mines publication, too, don't you, that I previously enumerated here?

A. No. Not at all. This is simply a list. I cannot agree or disagree with it because they say it is the list they cover. That is correct. I have no disagreement with that. They imply these are all chemical industries, and I qualify that in the preceding statement, that many classed as strictly chemical—not classed strictly as [64] chemical, employ chemical processes. My contention is that the fact that they have a chemical process involved in them does not make them chemical industry, as the Bureau of Mines interprets chemical industries in its use of limestone.

Q. I appreciate your argument, Doctor.

Mr. O'Brien: I object to that. He is giving no argument.

Mr. Enright: I objected earlier to his argument.

Q. You disagree also with Chemical and Metallurgical classification, as stated in this article?

(Deposition of Dr. Oliver Bowles.)

A. No, I cannot say that, because that is the list they say they are considering. They don't say what it is. I cannot disagree with it. They don't say this is what we consider the chemical industries. They don't say so. If they said so, I would disagree with them, but they don't.

Q. They list lime and cement under chemicals. Read it again. Here. You wrote the article—caused it to be published by the Bureau of Mines. I assume I am correct. You were the author of it. And the Bureau of Mines published it—the Government Printing Office.

A. No. Looking at that wording, I do not agree with it, and I have so said in the preceding paragraph.

Q. Thank you; and you do not agree with Chemical and Metallurgical Engineering?

A. As calling these chemical processes. [65]

* * *

Q. Have you made a study of the subject matter at any time during your experience?

A. Well, I have read a great deal about the solubility of limestone.

Q. (By Mr. Enright): I would like to check my notes. I believe that is all the questions I have at this time, but I would like to check my notes: if it is convenient, may we have a short recess?

Mr. O'Brien: We will take a short recess.

(Brief recess.)

Mr. O'Brien: On the record.

(Deposition of Dr. Oliver Bowles.)

Mr. Enright: There is one other subject here that I believe I covered in my examination and it pertains to a statement appearing at page 399 and 400 of your publication, *The Stone Industry*, published by McGraw Hill in 1939. If you wish, I will read the statement, or if you desire, you read the paragraph commencing at the bottom of 399, ending on page 400, at the top. I will read it.

“Few extensive limestone deposits comparable with those in many of the eastern states occur in California. Most of them are irregular ventricular bodies of variable magnesia content. Mining or quarrying problems are often difficult, and many deposits are far from markets.

Numerous comparatively small areas of shelly compact or crystalline limestones are cropping in many [80] counties, supplying the chief raw materials for important cement and lime industries, but various igneous rocks are used more widely than limestone as sources of crushed stone.”

Now, directing your attention to the last clause, various igneous rocks are used more widely than limestone, as sources of crushed stone, do you have that statement in mind?

The Witness: Yes.

Q. (By Mr. Enright): That is true today, is it not?

A. I believe it is.

Q. Thank you.

Mr. Enright: I have no further questions.

(Deposition of Dr. Oliver Bowles.)

Further Examination by Counsel for Government
By Mr. O'Brien:

Q. Continuing where Mr. Enright left off there, I would like to have the record read that, continuing on page 400, Dr. Bowles states in his book: "Nevertheless, crushed and pulverized limestones are utilized in many ways, including stone for concrete aggregate, road construction, railroad ballast, flux, refractories, glass and sugar manufacture, agricultural use, roofing gravel, terrazzo, chicken grit, whiting, and whiting substitute. Both the extreme northern part of California and the desert regions in the south, have large deposits of limestone in the more populous parts of the state but owing to distance for market [81] and inadequate transportation facilities, they have little or no commercial value.

Lime and crushed limestone products sold in California in 1929 were valued at over \$1,100,000 and cement nearly \$23 million. In 1932, the figures were, respectively, \$775,000 and \$8,485,000.00."

Mr. Enright: That is tons, is it not, there, at the last? Not dollars?

Mr. O'Brien: No. Dollars.

Mr. Enright: Perhaps we should have the Doctor geographically define southern California for the purposes of his statement there in that [82] book.

* * *

[Endorsed]: Filed March 21, 1957.

PLAINTIFF'S EXHIBIT No. 29

Monolith Portland Cement Company

Computation of Allowable Depletion
For the Calendar Year 1951

Computation of Refund:

Revised taxable income—

Taxable income, per revenue agent's report.....\$780,744.09

Additional depletion—

Percentage depletion, per revenue

agent's report\$109,244.28

Revised percentage depletion

(statement attached)(623,083.10) (513,838.82)

Revised taxable income\$266,905.27

Refund due—

Tax, per revenue agent's report.....\$388,326.56

Revised tax—see below 127,553.36

Refund due\$260,773.20

Tax Computation:

Revised taxable income\$266,905.27

Less—Capital gains 8,785.16

Revised ordinary income\$258,120.11

Tax thereon, 50.75% - \$5,500.00\$125,495.96

Tax on capital gains, 25% 2,196.29

Adjustment for partially tax exempt interest.... (138.89)

Revised tax\$127,553.36

Received for Identification.

PLAINTIFF'S EXHIBIT No. 31

Statement Showing Shipments in Bulk and Sacks
From Monolith Cement Plant at Monolith, California,
And Per Cent of Each
For the Years 1951 to 1957, Inclusive

Year	Bulk		Sacks		Total
	%	Bbls.	%	Bbls.	
1951	63.49	1,695,392.47	36.51	975,144.75	2,670,537.22
1952	63.87	1,652,222.04	36.13	934,423.25	2,586,645.29
1953	59.27	1,623,071.46	40.73	1,115,231.25	2,738,302.71
1954	63.99	1,853,408.04	36.01	1,043,091.50	2,896,499.54
1955	61.65	1,854,103.41	38.35	1,153,344.00	3,077,447.41
1956	68.01	2,115,531.53	31.99	944,900.00	3,110,431.53
1957	76.87	2,415,211.98	23.13	726,874.25	3,142,086.23
Total....	65.55	13,208,940.93	34.45	6,943,009.00	20,151,949.93
(6 Years)					

W.A.G.—3/21

Received for Identification.

PLAINTIFF'S EXHIBIT No. 33

Monolith Portland Cement Company

Computation of Allowable Depletion
For the Calendar Year 1951

Newhauser
3-24-58

Computation of Refund:

Revised taxable income—

Taxable income, per revenue agent's report.....\$780,744.09

Additional depletion—

Percentage depletion, per revenue

agent's report\$109,244.28

Revised percentage depletion..(628,820.89) (519,576.61)

Revised taxable income\$261,167.48

Refund due—

Tax, per revenue agent's report.....	\$388,326.56
Revised tax—see below	124,641.43

Refund due \$263,685.13

Tax Computation:

Revised taxable income	\$261,167.48
Less—Capital gains	8,785.16

Revised ordinary income \$252,382.32

Tax thereon, 50.75% - \$5,500.00 \$122,584.03

Tax on capital gains, 25% 2,196.29

Adjustment for partially tax exempt interest.... (138.89)

Revised tax \$124,641.43

Received in evidence March 24, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 498, inclusive, containing the original:

Complaint.

Answer.

Stipulation extending time to file "Memorandum of Law" required in Paragraph 4 of Order for Pre-Trial.

Statement re Pre-Trial Order Item 6:
11/30/56.

Pre-trial Law and Citation Memorandum:
11/30/53.

Pre-Trial Memorandum for the Defendants.
Stipulation of Facts No. 1.

Order continuing Pre-Trial hearing, filed
12/4/56.

Request for hearing of ex parte matter, filed
12/4/56.

First Request for Admissions.

Supplement to Pre-Trial Law and Citation
Memorandum, 1/23/57.

Objections to and Statement in Response to
Plaintiff's First Request for Admissions.

Minute Order 1/28/57 re pretrial hearing.

Minute Order 3/13/57 re continuance pre-
trial hearing.

Plaintiff's Opening Memo per 1/28/57 pre-
trial direction.

Stipulation of Facts No. 2.

Supplemental pre-trial Memorandum for De-
fendants.

Application for extension of time re filing
Briefs.

Plaintiff's Closing Pre-Trial Memo per
1/28/57 pre-trial direction.

Request for Admissions and Interrogatories.

Request for hearing of ex parte matter, filed
5/9/57.

Order continuing pre-trial hearing.

Answer to Request for Admissions.

Answer to Interrogatories.

Minute Order 5/9/57 re continuance of pre-trial conference.

Request for hearing ex parte matter, filed 6/19/57.

Order re Pre-Trial Memorandum.

Copy of Opinion of U.S. Court of Appeals for First Circuit in Case 5186 Dragon Cement Co. v. U.S.A.

Request for Admissions 6/28/57.

Answer to Request for Admissions.

Minute Order 6/19/57 re filing of copy of Opinion in Case 5186 Dragon Cement Co. v. U.S.A., District of Maine.

Stipulation of Facts No. 3.

Minute Order 7/22/57 re pre-trial conference.

Minute Order 8/2/57 re trial.

Stipulation continuing hearing for Oral Argument, filed 12/6/57.

Stipulation continuing hearing for Oral Argument, filed 1/13/58.

Notice of Motion and Motion to file Supplement to Complaint.

Points and Authorities in support of Motion to file Supplement to Complaint.

Stipulation re Motion and Continuance of Hearing for Oral Argument and Order.

Affidavit of Bill B. Betz, in re 3/17/58 hearing.

Request for hearing ex parte matter, filed 3/28/58.

Order granting additional time to file objec-

tions to proposed Findings of Fact, Conclusions of Law and Judgment.

Minute Order 3/17/58 re oral argument.

Minute Order 3/21/58 re trial.

Amendment to Complaint.

Answer to Supplement to Complaint.

Minute Order 3/24/58 re further trial.

Findings of Fact, Conclusions of Law and Judgment, filed 4/14/58, but not signed by Court (Plaintiff's).

Minute Order 3/27/58 re additional time to prepare objections to proposed findings and judgment.

Exceptions to Defendant's Proposed Findings and Conclusions of Law.

Answer to Amended Complaint.

Defendant's proposed Amendments to proposed Findings of Fact and Conclusions of Law Lodged by Defendant on 4/4/58.

Defendant's Memorandum re Defendant's Proposed Amendments to Defendant's Proposed Findings of Facts and Conclusions of Law lodged on 4/4/58.

Objections and Notice (plaintiff).

Clerk's copy of Notice of Entry of Order for election as between defendants and dismissal of defendant Robert A. Riddell, etc., and judgment.

Exceptions, Points and Authorities of April 12, 1958.

Affidavit of Gerard J. O'Brien.

Order denying Defendant's Motion to Amend Defendant's proposed Findings of Fact, and

Conclusions of Law in accordance with Defendant's Proposed Amendments filed on 4/9/58.

Minute Order 4/11/58 re placing on calendar hearing on objections to Findings and Conclusions.

Minute Order 4/14/58 re hearing on objections to proposed findings, etc.

Order for election as between Defendants and for Dismissal of Defendant Robert A. Ridell, etc.

Findings of Fact, Conclusions of Law and Judgment, entered 4/14/58.

Plaintiff's Notice of Appeal.

Designation of contents of record on appeal.

Defendant's Notice of Appeal.

B. Plaintiff's Exhibits 1 to 33, inclusive.

C. Eight volumes of Reporter's Official Transcript of Proceedings had on:

1/28/57; 7/22/57; 8/2/57; 3/17/58; 3/21/58; 3/24/58; 3/27/58 and 4/14/58.

I further certify that my fee for preparing the foregoing record, amounting to \$2.80, has been paid by appellant.

Dated: June 26, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16063. United States Court of Appeals for the Ninth Circuit. Monolith Portland Cement Company, a Corporation, Appellant, vs. United States of America, Appellee. United States of America, Appellant, vs. Monolith Portland Cement Company, a Corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed and Docketed: June 28, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16063

MONOLITH PORTLAND CEMENT COMPANY,
a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UNITED STATES OF AMERICA,

Appellant,

vs.

MONOLITH PORTLAND CEMENT COMPANY,
a Corporation,

Appellee.

STATEMENT OF POINTS
ON APPEAL

In accordance with its Notice of Appeal, appellant Monolith Portland Cement Company submits for determination the question:

Whether the Court below erred in fact or in law in holding that the limestone produced and used by appellant in the year 1951, was not "chemical grade limestone" under Section 114(b)(4)(A)(iii) of the Internal Revenue Code of 1939, as amended.

Dated: July 9, 1958.

Respectfully submitted,

ENRIGHT, ELLIOTT & BETZ,
JOSEPH T. ENRIGHT,
NORMAN ELLIOTT,
BILL B. BETZ,

By /s/ NORMAN ELLIOTT,
Attys. for Appellant, Monolith
Portland Cement Company.

Affidavit of service by mail attached.

[Endorsed]: Filed July 11, 1958.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
CROSS-APPELLANT, UNITED STATES
OF AMERICA, INTENDS TO RELY ON
CROSS-APPEAL

[Court of Appeals Rule 17.6]

Comes Now the cross-appellant, United States of America, and states that it relies in its cross-appeal upon the points stated in its designation of points on cross-appeal filed in the District Court.

Dated: August 5, 1958.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,

Assistant United States At-
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JOHN G. MESSER,

Assistant United States
Attorney;

/s/ JOHN G. MESSER,

Attorneys for Appellee and
Cross-Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 11, 1958.

At a Stated Term, to wit: The October Term
A.D. 1959, of the United States Court of Ap-
peals for the Ninth Circuit, held in the Court
Room thereof, in the City of Los Angeles, in
the State of California, on Monday, the third
day of November, in the year of our Lord, one
thousand nine hundred and fifty-eight.

Present: Honorable Richard H. Chambers, Circuit
Judge, Presiding,

Honorable Stanley N. Barnes, Circuit
Judge,

Honorable Frederick G. Hamley, Circuit
Judge.

[Title of Cause.]

ORDER ON MOTIONS

On consideration whereof, it is now here ordered and adjudged by this Court, that the motion of Appellant, Monolith Portland Cement Company to vacate order of the District Court extending time to docket cause on appeal be, and hereby is denied as moot.

It is further ordered that the stipulation for consideration of original exhibits and reporter's transcript without reproduction in printed transcript, be and hereby is approved by the Court as constituted.

(November 3, 1958.)

No. 16063.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

EMERALITE PORTLAND CEMENT COMPANY,

Appellant.

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

JOSEPH T. ELLIOTT,
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FILED

DEC 14 1958

PAUL F. O'BRIEN, CLERK



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No. 16063.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MONOLITH PORTLAND CEMENT COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

I.

JURISDICTION OF THE COURT.

This action for refund of income taxes was commenced in the District Court for the Southern District of California, Central Division, under Section 1346 of Title 28 of the United States Code. The jurisdiction of this Court rests upon Section 1291 of the Judicial Code.

II.

STATEMENT OF THE CASE.

A. Statement of the Question Involved.

Whether "chemical grade limestone" which was accorded a percentage depletion at the rate of 15% by Section 114(b)(4)(A)(iii) of the Internal Revenue Code of 1939, as amended, is commonly commercially understood to mean and was intended by Congress to encompass limestone whose chemical composition and physical

characteristics are such as to make it suitable for use in the industrial chemical process of producing cement.

The District Court in effect answered this question "No" by holding that taxpayer's limestone was not "chemical grade" as contemplated by the statute, although such limestone was admittedly of such quality, chemical composition and physical characteristics as to make it suitable for use in the industrial chemical process of producing cement. Taxpayer contends this question should be answered "Yes."

In addition, by its cross-appeal, appellee seeks to: (1) raise an issue as to whether appellant's bagging operation should be excluded from the ordinary treatment processes for percentage depletion purposes as held by the District Court following the parties' stipulations; and (2) asserts that the District Court erred in holding that the income and expenses attributable to the mineral materials which appellant adds to its limestone in order to obtain finished cement should be included when computing appellant's allowable percentage depletion deduction.

B. Nature of the Case.

Appellant, Monolith Portland Cement Company, herein sometimes called "taxpayer," and "Monolith," on July 27, 1956, filed a civil action against the United States under the provisions of Section 1346, Title 28 of the United States Code, as amended on July 30, 1954, for the recovery of internal revenue taxes alleged to have been erroneously and illegally assessed against and collected from the taxpayer by the Commissioner of Internal Revenue.

Taxpayer is the owner and operator of a cement plant at Monolith, California, where it operates a limestone rock quarry and uses the limestone rock so extracted in the manufacture of Portland cement. This suit involves the rate of percentage depletion to which the taxpayer is entitled on its gross income from mining, in the calendar

year 1951, under the Internal Revenue Code of 1939, as amended October 20, 1951, in force and effect in that year (26 U. S. C. 23(m) and 114(b)(4)(A)).

In order to obtain great and repeated delays, defendant's counsel made stipulations and representations to the court withdrawing from controversy questions concerning bags and bagging and other issues as shown by the record and three stipulations of fact. [Exs. 24, 25, 27.] Thereafter, defendant's counsel requested the findings and a proposed judgment carrying out the stipulations, and the issues were so tried and submitted. Defendant's counsel did, after the final submission of the case, make a belated effort to discredit some of the stipulations and representations, but the court considered this effort as not being timely and under the record made by the parties, as containing no merit.

C. The Judgment in the District Court.

The case was tried without a jury before the Honorable William C. Mathes, District Judge. On August 2, 1957, the Court received in evidence Exhibits 1 to 23 offered by taxpayer; on March 21, 1958, the Court heard the evidence of witnesses called by taxpayer, and received in evidence Exhibits 24, 25 and 27 to 32 offered by taxpayer; and, on March 24, 1958, the court received in evidence Exhibit 33 offered by taxpayer. The testimony of Dr. Oliver Bowles, witness for the United States, was received in deposition form, Exhibit 23.

After oral argument and ruling from the bench, the Court on April 14, 1958, entered judgment in favor of taxpayer in the sum of \$264,435.41 with interest as provided by law. [R. 72-73.] The trial judge did not write an opinion.

D. The Trial Court's Findings of Fact and Conclusions of Law and Judgment.

The findings of fact, conclusions of law and judgment herein filed and entered April 14, 1958, are reproduced in full in the record. [R. 62-73.] However, the relevant and pertinent findings of fact and conclusions of law, with regard to the basic question presented by this appeal, are set forth herein for easy reference.

“FINDING OF FACT III.

“During the entire year 1951 plaintiff mined a calcium carbonate rock generally known as ‘limestone,’ which it processed by the usual and customary process steps applied in the cement industry to obtain any of the various types of Portland cement. Said processes were applied by plaintiff at its cement plant at Monolith, California, adjacent to the quarry from which plaintiff mines the limestone. The process of heating or calcining of the materials used by plaintiff caused chemical changes to occur in them to obtain cement.

“FINDING OF FACT V.

“The actual computed average high and low chemical analysis, made approximately each week, of the material mined by plaintiff during the year 1951 revealed a high of 87.68% calcium carbonate and a low of 82.45% calcium carbonate, or an average of 85.20% of calcium carbonate. The calcium carbonate content of plaintiff’s limestone involved in this case was not high enough to qualify the material as ‘chemical grade limestone’ within the meaning of Section 114(b)(4)(A)(iii) of the Internal Revenue Code of 1939, as amended.

“FINDING OF FACT VI.

“The only product sold by plaintiff during the year 1951 as a result of its limestone mining operations

was Portland cement in bulk and in bag or sack containers.

“FINDING OF FACT XVI.

“The record shows, and the Court finds as a fact, that limestone of a relatively high calcium carbonate content is known in industry and commerce as chemical or metallurgical grade limestone.

“CONCLUSION OF LAW II.

“Plaintiff, as mine operator, mined a calcium carbonate rock generally known as ‘limestone’ which it processed to obtain any of the various types of Portland cement.

“CONCLUSION OF LAW III.

“‘Chemical grade limestone’ within the meaning of the term as used in Section 114(b)(4)(A)(iii) of the Internal Revenue Code of 1939, as amended, means a limestone which is of a relatively high calcium carbonate content.

“CONCLUSION OF LAW IV.

“The calcium carbonate rock mined by plaintiff was not a ‘chemical grade limestone’ within the meaning of the statute, and so was subject to a percentage depletion allowance of ten (10) per centum within the provisions of Section 114(b)(4)(A)(ii) of the Internal Revenue Code of 1939, as amended.

“CONCLUSION OF LAW XI.

“All findings of fact which are deemed to be conclusions of law are hereby incorporated in these conclusions of law.”

III. THE STATUTE INVOLVED.

The pertinent statute, Internal Revenue Code of 1939, as amended (26 U. S. C. 23(m) and 114(b)(4)), provides that:

“Sec. 23. DEDUCTIONS FROM GROSS INCOME.

“In computing net income there shall be allowed as deductions:

* * * * *

“(m) Depletion.—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. * * *”

“(n) * * * The basis upon which depletion, * * * are to be allowed * * * shall be as provided in section 114.”

* * * * *

“Sec. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * * *

“(b) Basis for Depletion.

* * * * *

“(4) Percentage Depletion for Coal and Metal Mines and for Certain Other Mines and Natural Mineral Deposits.

“(A) In General.—The allowance for depletion under section 23(m) in the case of the following mines and other natural deposits shall be—

“(i) in the case of sand, gravel, slate, stone (including pumice and scoria), brick and tile clay, shale, oyster shell, clam shell, granite, marble, sodium chlo-

ride, and, if from brine wells, calcium chloride, magnesium chloride, and bromine, 5 per centum,

“(ii) in the case of coal, asbestos, brucite, dolomite, magnesite, perlite, wollastonite, *calcium carbonates*, and magnesium carbonate, 10 per centum,

“(iii) in the case of metal mines, aplite, bauxite, fluorspar, flake graphite, vermiculite, beryl, garnet, feldspar, mica, talc (including pyrophyllite), lepidolite, spodumene, barite, ball clay, sagger clay, china clay, phosphate rock, rock asphalt, trona bentonite, gilsonite, thenardite, borax, fuller’s earth, tripoli, refractory and fire clay, quartzite, diatomaceous earth, metallurgical grade limestone, *chemical grade limestone*, and potash, 15 per centum, and

“(iv) in the case of sulfur, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. *Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance under section 23(m) be less than it would be if computed without reference to this paragraph. (Italics added.)*

“(B) Definition of gross income from property.—As used in this paragraph the term ‘gross income from the property’ means the gross income from mining. The term ‘mining’ as used herein shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products, and so much of the transportation of ores or minerals (whether or not by common carrier) from the point

of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto as is not in excess of 50 miles unless the Secretary finds that the physical and other requirements are such that the ore or mineral must be transported a greater distance to such plants or mills
* * *

IV.

STATEMENT OF ISSUES INVOLVED.

The basic question before the Court on this appeal is simply whether taxpayer is entitled to have its limestone classified as "chemical grade." The determination of this question hinges upon whether taxpayer's limestone quarried and used in its cement operation in 1951 was "chemical grade limestone" or merely "calcium carbonates" within the meaning of Section 114(b)(4)(A) of the Internal Revenue Code of 1939, as amended.

By its Statement of Points on its cross-appeal [R. 148] filed herein, some two months after its Notice of Appeal [R. 75] the respondent apparently seeks to repudiate its stipulations below whereby it agreed that the appellant's bagging operation should be excluded from the ordinary treatment processes for percentage depletion purposes. This problem will be separately discussed following the basic question of "chemical grade limestone," as will respondent's second point challenging the correctness of the trial court's ruling on additives.

Monolith was "aggrieved" by the judgment below and entitled to review thereof, because:

1. Monolith's limestone all comes from one deposit. Such judgment, describing and classifying limestone used in 1951 as not "chemical grade" adversely affected the commercial value of the entire deposit—an interest in real property;

2. The determination that 1951 limestone was not "chemical grade" may control such "classification" issue in pending cases for later years. Monolith's refund for such years thus might be reduced, depending on the treatment of gross income from mining;

3. The Treasury Department has taken inconsistent positions in different courts in current depletion cases. A controlling Supreme Court decision in such a case could affect Monolith's refund for later years;

4. The trial court's classification of Monolith's 1951 limestone did not affect its dollar recovery below. However, Monolith would be seriously damaged if the judgment were modified in this case so as to again make the rate of depletion significant.

A prerequisite to a proper appeal is that the appealing party be "aggrieved."

United States v. Adamant Co., 197 F. (2d) 1 (C. A. 9th 1952) cert. den. 344 U. S. 903, 97 L. ed. 698.

"Aggrieved" has been defined by the courts as:

"... Any person having an interest recognized by law in the subject-matter of the judgment, which interest is injuriously affected by the judgment, is a party aggrieved and entitled to be heard upon appeal..."

In re Colton's Estate, 164 Cal. 1, 127 P. 643 (1912).

Even a party who has received the dollar judgment prayed is "aggrieved" in part, and hence may appeal, if he does not obtain all the relief he sought by the judgment.

United States v. Dashiell, 70 U. S. 688, 18 L. ed. 268 (1866);

Houchin Sales Co. v. Angert, 11 F. (2d) 115 (C. C. A. 8th, 1926);

Cochran v. M. & M. Transp. Co., 110 F. (2d) 519 (C. C. A. 1st, 1940);

Galloway v. General Motors Acceptance Corp., 106 F. (2d) 466 (C. C. A. 4th, 1939).

The taxpayer here was clearly “aggrieved” by the judgment below, as such word is used in the law defining a party’s right to appeal, in that such judgment disparages the quality, condition or value of taxpayer’s interest in real property—its limestone. The trial court’s judicial determination of the quality of taxpayer’s 1951 limestone (which was in issue below) will have a direct adverse pecuniary effect on the value of the limestone deposit in the marketplace, as well as in the other tax cases referred to above.

Although this is not a case of slander of title, such cases are helpful, in showing that taxpayer was “aggrieved” and entitled to appeal.

It has been held that disparagement of the quality, condition or value of the plaintiff’s property is actionable. Thus, in *Paull v. Halferty*, 63 Pa. 46, 3 Am. Rep. 518, it was held that where the owner of an iron-ore mine lost a sale because of misrepresentations that the ore would suddenly run out, such statements were actionable.

So, too, it has been held that a taxpayer is entitled to a correct determination of his tax deficiency, without regard to its immediate consequence.

Keeler v. C. I. R., 180 F. (2d) 707, 709 (C. C. A. 10th, 1950).

In the *Keeler* case, the court held that to be an “aggrieved person” entitled to appeal from a Tax Court decision:

“ . . . it is not necessary that there be an actual pecuniary loss. The proper test is whether the decision invades the legal rights of a person or operates adversely on his property rights and interests.”

This is the crux of the instant case.

V.

STATEMENT OF ADMITTED AND
STIPULATED FACTS.

A. Taxpayer's Chemical Process.

It is unnecessary to describe taxpayer's mining operation in detail. The facts are undisputed, and are set forth in the Findings of Fact [R. 63-69] and the Stipulations of Facts between the parties. [Ex. 1, R. 16; Ex. 8, R. 27; Ex. 19, R. 40.]

The Monolith Portland Cement Company (hereafter called “taxpayer”), is engaged in the business of producing cement. Incident to its production of cement, taxpayer operates a limestone quarry at Monolith, California, from which it extracts limestone, all of which it uses in the production of its cement.

During the entire year 1951 taxpayer mined a calcium carbonate rock generally known as “limestone,” all of which it processed by the usual and customary process steps applied in the cement industry to obtain any of the various types of Portland cement. [F. of F. III, R. 63.]

The production of Portland cement is divided into two divisions: the preparation and physical proportioning of raw materials; and the calcination or heating in a rotary

kiln of such materials. The calcination causes complex chemical reactions which result in the formation of entirely new compounds, primarily tricalcium silicate, dicalcium silicate, tricalcium aluminate and tetracalcium alumino-ferrite. [Stip. of Facts No. 1, R. 18; Ex. 23, pp. 11, 27-28; R. 129.]

The cement industry is universally recognized as a chemical industry in the United States. Dr. R. H. Bogue, Director, Portland Cement Association Fellowship, National Bureau of Standards, in his authoritative book, "The Chemistry of Portland Cement" (2d Ed., 1955, Reinhold Pub. Co., N. Y.) states (p. 37):

"The manufacture of Portland Cement is distinctly a chemical industry and will be treated as a special problem in chemical control."

The Government's witness on limestone, Dr. Oliver Bowles, admitted that Dr. Bogue was the authority in the field. [Ex. 23, pp. 60-62; R. 132-133.]

B. The Chemical Quality of Taxpayer's Limestone.

The actual computed chemical analyses, made approximately each week, of the limestone mined by the taxpayer during the year 1951 revealed an average of 85.20% of calcium carbonate. [F. of F. No. V, R. 64.]

The Government concedes that the process of producing Portland cement, involving calcination and the formation of entirely new chemical compounds, is a "chemical process" comparable to the chemical process which produces lime by calcination of limestone. [*E.g.*, Dr. Bowles' Deposition, Ex. 23, pp. 11, 28, 63; R. 129, 134.]

It is undisputed that limestone, containing comparable amounts of calcium carbonates, is widely used in the

United States to produce cement by chemical process and that such production of cement is the most important chemical process use of limestone, dollarwise and tonnage-wise. [Ex. 23, p. 60; R. 131.]

C. The Chemical Uses of Limestone.

The United States Bureau of Mines, Minerals Yearbook, 1952 and 1953, Tables 30, 31 and 34 [Stip. of Facts No. 2, p. 2, line 30, to p. 6, line 32; Ex. 8] reported the various major uses of limestone in the United States in the year 1951, as follows [R. 29-30]:

LIMESTONE	TONS
(Excluding Lime & Cement)	
Cut, Flagg, etc.	806,842
Riprap	3,101,470
Fluxing Stone	39,929,957
Concrete and Road Metal	112,717,050
Railroad Ballast	9,085,006
Agriculture	19,400,610
Miscellaneous	20,438,880
(Including alkali, calcium carbide, glass, paper mills, supra, poultry grit)	
Subtotal	205,480,000 (Rounded)
CEMENT	64,284,000
LIME	16,511,000
Total	286,275,000 (Rounded)

The three categories in the above tabulation which use limestone in a chemical process are "cement," "lime" and a portion of "miscellaneous."

D. The Testimony of Dr. Oliver Bowles.

Dr. Bowles, on deposition, testified that he had no knowledge of the use of the phrase "chemical grade limestone" in the limestone industry. [Ex. 23, pp. 7-9; R. 122-124.] He expressed the opinion that: "As we interpret it, in the Bureau of Mines, a chemical grade limestone is one that is used for chemical uses such as alkali manufacture, calcium carbide manufacture; in the glass, paper, and sugar industries." [Ex. 23, p. 10; R. 125.] He expressed the further opinion that he would not consider a limestone containing 85% calcium carbonate a chemical grade limestone because he said it was not used by the industries he classified as chemical industries [Ex. 23, pp. 10-11; R. 125-126], and that he did not consider the Portland Cement Industry to be a "chemical industry," "as the term is understood in the Bureau of Mines." [Ex. 23, p. 11; R. 126.]

However, Dr. Bowles admitted that:

(1) The cement industry is a "chemical process industry" although it did not meet his definition of a "chemical industry" [Ex. 23, pp. 62-65; R. 133-135]; there is a complex, chemical reaction in the process of cement manufacture [Ex. 23, p. 11; R. 126] and that the chemical reactions occurring in the cement process were so complicated that the chemists themselves were not quite sure exactly what chemical compounds were formed by calcination [Ex. 23, p. 60; R. 131-132];

(2) For two of the four major uses of commercial limestone—as a flux and for cement or lime manufacture—the chemical composition of the limestone is "all important" [Ex. 23, p. 55; R. 130-131];

(3) He considered that cement was the most important product made from limestone both dollarwise and tonnage-wise [Ex. 23, p. 60; R. 131];

(4) He classified cement under the heading "Uses for which Chemical Properties are Most Important" in his text [Ex. 23, p. 60; R. 131];

(5) He recognized Dr. R. H. Bogue as the authority in the field, and was familiar with Dr. Bogue's treatise "The Chemistry of Portland Cement" a chemistry book on Portland cement [Ex. 23, pp. 60-61; R. 132];

(6) The reason he considered limestone calcined into lime by a chemical process as "chemical grade limestone" and ruled out limestone calcined into cement by a comparable chemical process, was because he believed that limestone chemically processed into lime had a calcium carbonate content of 98% or more, and the limestone chemically processed into cement was much lower in calcium carbonate content [Ex. 23, p. 17; R. 127];

(7) If the cement industry were classified as a "chemical industry," the limestone so used would be a "chemical grade limestone" [Ex. 23, p. 89];

(8) In his publications he had included the cement industry under the heading of the "chemical process industry" along with glass, chemicals, lime, etc. [Ex. 23, pp. 62-63; R. 133-134.]

E. The Record.

The parties stipulated and this Court by order allowed the original exhibits and reporter's transcript of testimony below to be made part of the record before the Court without the necessity of printing them.

ARGUMENT.

“CHEMICAL GRADE LIMESTONE” IS LIMESTONE SUITABLE FOR USE IN ANY INDUSTRIAL CHEMICAL APPLICATION AND THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT TAXPAYER’S LIMESTONE, ADMITTEDLY CALCINATED BY CHEMICAL PROCESS TO PRODUCE CEMENT WAS NOT “CHEMICAL GRADE LIMESTONE.”

A. Statement of the Question Involved.

As set out in the Statement of the Case above, the question involved is whether taxpayer’s 1951 limestone used in its cement process was “chemical grade limestone,” and thus entitled to a percentage depletion at the rate of 15% under Section 114(b)(4)(A)(iii) of the Internal Revenue Code of 1939, as amended.

The question of whether the taxpayer’s limestone is “chemical grade limestone” presents two questions:

- (a) What is “chemical grade limestone”?
- (b) Does taxpayer’s limestone fall within the quality of limestone included in the definition of (a) above?

Question (a) is clearly a question of law—the proper interpretation of the statute and the language used by Congress. Question (b) just as clearly, is a question of fact—which may be resolved by the stipulated facts and the evidence therein, after “chemical grade limestone” is defined as a matter of law.

Thus, the ultimate question before this Court—*i.e.*, whether or not taxpayer’s limestone is “chemical grade” limestone, is a mixed question of law and fact. No citation of authorities is believed necessary to establish that this Court is not bound by the determination of the court below. This is not a case where the taxpayer must overthrow a finding of fact under Rule 52 of the Federal

Rules of Civil Procedure on the ground that such finding is "clearly erroneous." The question "What is chemical grade limestone?" is a question as to which this Court is as qualified as the District Court to express its opinion because the controlling facts are undisputed. Taxpayer submits that any reasonable construction of the statute necessarily results in the determination that the limestone it used in the year 1951 in the production of cement was "chemical grade limestone."

B. The Chemical Character of the Cement Industry.

The cement industry is a chemical process industry comparable to the manufacture of glass, paper, paint, soap, sugar, plastics, dye, ceramics, etc. In order to appreciate the significance of this basic fact, we must review briefly the steps in the cement process, the controls exercised and the quality of the finished product.

The ordinary treatment process normally applied throughout the industry in the United States to produce cement and applied in the normal fashion by taxpayer to produce its cement, were and are, briefly: (a) quarrying and primary crushing of the limestone; (b) secondary crushing and grinding of the crushed limestone, with varying amounts of iron ore and silica rock, to obtain a properly proportioned raw mixture which is stored in silos pending further processing; (c) sintering the raw mixture in rotary kilns to produce cement clinker; (d) grinding the resultant clinker with gypsum or other additives to a fineness comparable to flour; (e) storing the resultant finished cement in silos; and (f) sacking the cement and loading it for shipment to customers, or loading the cement for shipment to customers in bulk.

The sintering process described above in the case of the production of cement, sometimes referred to as calcination, causes complex chemical reactions between the compounds of the raw materials which result in the for-

mation of entirely new chemical compounds. The new chemical compounds are the tricalcium silicate, dicalcium silicate, tricalcium aluminate and tetracalcium aluminoferrite required to obtain cement. The mixture of new chemical compounds formed as the result of such sintering comes from the rotary kiln in the form of cement clinker. Cement cannot be made unless these chemical reactions shall occur and unless the chemical reactions create the new compounds in certain specified acceptable proportions. Such proportions of such new compounds are determined by the proportions of calcium, silica, iron and alumina contained in the raw mixture sintered in the rotary kiln and the specified degree of freedom of certain undesirable impurities found in some limestone.

Cement produced by members of the highly competitive cement industry in the United States must meet rigid, physical and chemical specifications in order to be marketable. These specifications are prescribed by such specification writing bodies as the American Society for Testing Materials, American Association of Highway Officials and the Federal Government.

Limestone, in order to be suitable for use in the production of cement which will meet such specifications, must meet strict requirements as to relative calcium carbonates content and degree of freedom from certain undesirable impurities. The great preponderance of known deposits of limestone in the United States and in California does not contain limestone meeting such strict requirements in commercially exploitable quantities. [*E.g.*, Exs. 12; 15, pp. 5, 11-23.] In addition, it should be noted that even deposits of limestone containing limestone meeting such strict requirements in commercial exploitable quantities, may be of no commercial value for the production of cement because of their distance from the centers of population, for it is uneconomical for a cement plant to be located more than approximately 150-300 miles

from its marketing area, in that the cost of bringing the cement to market exceeds the market value. [*E.g.*, Ex. 15, pp. 36-37.]

C. The Words "Chemical Grade Limestone" Are to Be Given Their Ordinary Commercial Meaning, Not an Academic or Scientific Meaning.

The Report of the Senate Finance Committee (Rep. No. 781, 82d Cong., 1st Sess., p. 38) relating to the provisions of the Revenue Act of 1951 which amended Section 114(b)(4)(A) so as to add chemical grade limestone to the list of minerals subject to statutory depletion provided that

"the names of all the various enumerated minerals are of course intended to have their commonly understood commercial meaning."

This specific direction reinforces the settled case law on this subject, which uniformly holds that the words of the statute are to be given their plain, ordinary commercial meaning, and not an academic, geological or technical scientific meaning.

The Quartzite Stone Company v. Commissioner
30 T. C. 511 (May 29, 1958);

Spencer Quarries Inc. v. Commissioner, 27 T. C.
392 (November 29, 1956);

United States Gypsum Company v. United States,
253 F. 2d 738 (C. A. 7, 1958).

As the court stated in the case of *United States Gypsum Company v. United States*, 253 F. 2d 738 (C. A. 7, 1958) (p. 744):

"It is well established that in interpreting the meaning to be given words used in legislative enactments the words are to be given their known and ordinary signification. The obvious, plain and rational meaning is preferable to a narrow, strained, or hidden

meaning. Old Colony R. Co. v. Commissioner of Internal Revenue, 284 U. S. 552, 560, 52 S. Ct. 211, 76 L. Ed. 484; Torti v. United States, 7 Cir., 249 F. 2d 623.” (Emphasis added.)

In the case of *Marvel v. Merritt*, 116 U. S. 11, 29 L. Ed. 550 (1885), the court held that:

“ . . . ‘Mineral and bituminous substances in a crude state, not otherwise provided for, 20 per centum ad valorem tax’ . . . ”

were not technical, nor used in other than a popular meaning, and that:

“ . . . They are the words of common speech, and as such their interpretation is within the judicial knowledge, and therefore matter of law . . . ”

D. Although No Commonly Understood Meaning Exists for the Phrase “Chemical Grade Limestone” the Words “Chemical” “Grade” “Limestone” Are Commonly Understood to Mean Limestone of a Grade or Quality Suitable for Use in an Industrial Chemical Process.

1. The phrase “Chemical Grade Limestone” has no commonly understood commercial meaning.

The phrase “chemical grade limestone” is not defined in any of the standard dictionaries, encyclopedias, literature of the art, or technical references. Dr. Bowles admitted that he did not know if the phrase “chemical grade limestone” was used in any of the industries where limestone is chemically processed [Ex. 23, pp. 7-8; R. 122-123], and that he had never heard the phrase used in the limestone industry. [Ex. 23, p. 9; R. 124.]

The word “chemical” refers of course to the meaning understood and used by the trade or industry using a particular mineral. It is clear that no such meaning as the Government ascribes to the words “chemical grade

limestone” is used in any trade or industry producing or using limestone, as their own witness admits.

Actually, as will hereafter be discussed, when the industry or business refers to limestone of the particular specifications advocated by the Government, it calls for “high calcium limestone.” [*E.g.*, Ex. 15, p. 5; R. 120-121.] Although Congress presumably knew of such limestone, it did not use such term, and instead used the phrase “chemical grade limestone” which is persuasive that another less restrictive meaning was intended.

2. The words “chemical grade limestone” when given their ordinary commercial meaning, refer to a grade of limestone suitable for use in an industrial chemical process.

All limestone is a species of and composed primarily of calcium carbonates, magnesium carbonates, or a mixture of the two. The Government has stipulated that the taxpayer’s rock, in question here, is “a calcium carbonate rock generally known as limestone.” [Stip. of Facts No. 1, para. IV A, R. 18; see also Ex. 15, p. 5.]

Since it is thus undisputed that taxpayer’s rock is “limestone,” the words “chemical” and “grade” must next be given their ordinary commercial meaning.

The word “chemical” has been often defined in substantially the same words:

a. 14 C. J. S. 1102:

“Literally a substance used for producing a chemical effect, or one produced by a chemical process; a chemical agent prepared for scientific or economic use . . .”

b. *Phoenix Ins. Co. v. Fleming*, 65 Ark. 54, 44 S. W. 464, 465, 39 L. R. A. 789 (1898):

“. . . The term ‘chemical’ is defined as a substance used for producing a chemical effect, or one produced by a chemical process; a chemical agent prepared for scientific or economic use . . .”

c. *Stewart v. Robertson*, 45 Ariz. 143, 40 P. 2d 979, 983 (1935):

“... The term ‘chemical,’ used as a noun, is defined as ‘a substance produced by a chemical process, or used for producing a chemical effect’ . . .”

d. Webster’s New International Dictionary (2d Ed., 1948):

“... (2) Of or pertaining to chemistry; characterized or produced by the forces and operation of chemistry; employed in the processes of chemistry . . .”

These accepted definitions establish that the word “chemical” used as a noun, refers to:

- (1) something produced by chemical process; or
- (2) something used in a chemical process.

In this case, it is undisputed and the Government has stipulated that:

“The calcination or heat treatment (of taxpayer’s process) causes chemical reactions which result in the formation of new compounds between the principal raw materials limestone, clay and iron cinders.”
[Stip. of Facts No. 1, para. IV B; R. 18.]

The cement industry is universally recognized as a chemical process industry—that is, an industry utilizing a chemical process to obtain its commercially marketable product, cement. The Government’s only witness, Dr. Bowles, admitted this basic fact. [Ex. 23, pp. 11, 28, 63; R. 126, 129, 133-134.]

Since cement is produced by chemical process, and since limestone is one of the principal raw materials used in such process to bring about “chemical reactions,” such limestone is clearly “used for producing a chemical effect” in the words of the standard definitions of “chemical,”

and is, when suitable for such use, itself a “chemical.” The ordinary meaning lays emphasis on *function* and *use*, as distinguished from composition. In other words, if a mineral is specifically used to produce a desired chemical effect or reaction, it is a “chemical.”

Turning to the word “grade,” we find that it, too, has a commonly understood meaning.

a. Webster’s New International Dictionary (2d Ed., 1948):

“(1) A stage in a process . . . , (2) A position in any scale of rank, quality, or order; . . . (10) *Mining*. The relative value or content of an ore or mineral”

The 1942 edition added the words: “as high grade ore and low grade ore.”

b. The Government below admitted that this was the commonly understood meaning of “grade.”

The word “grade” further modifies “chemical” and clearly means and is commonly understood to mean a substance (here limestone) of a grade, order or quality suitable for a chemical use—that is, employed in a chemical process to obtain a chemical reaction. And it is undisputed that taxpayer’s limestone is of such quality as to meet the existing specification required for cement raw materials, and is so used in the chemical process employed to produce cement.

E. Chemical Grade Limestone Is Limestone Suitable for Use in Any Industrial Chemical Application.

As discussed in the Statement of Facts [p. 13] the uses of limestone are rather well documented. Some 90 million tons are employed yearly in the chemical processes incident to the production of cement, lime, paper, glass, sugar, calcium carbide, etc. The remaining 200 million tons are used for roads, agriculture, fluxing, etc.

The line of demarcation between such chemical process uses and non-chemical process uses is clearly defined. However, any attempt to "refine" the phrase "chemical" is difficult if not impossible, and the line between "chemical process" industry and "chemical product" industry is shadowy and nebulous.

The government, and apparently the court below, construed the words "chemical grade limestone" to refer only to the very high calcium limestone which constitutes a small fraction of the chemical process uses. Taxpayer submits that this was clearly error.

The Court of Appeals for the Sixth Circuit has followed this approach in the recent case of *United States v. Wagner Quarries Co.*, 260 F. 2d 907 (Nov. 14, 1958), affirming the District Court which *inter alia* held that limestone used for cement making is a "chemical purpose" and allowing 15% depletion. The Sixth Circuit Court stated (p. 908):

"The test is not what various purposes the limestone might be used for,—this is conceded, but rather whether it can be found to qualify for chemical or metallurgical purposes."

In that case the District Court, *inter alia*, ruled that the limestone taxpayer sold to the Medusa Cement Company for making cement was "chemical grade limestone" and entitled to depletion at the rate of 15%. The record disclosed that 40% of such taxpayer's limestone sold in 1951 was "utilized for chemical and metallurgical purposes" (the court included cement as a "chemical use") and the remainder was "suitable" for such uses. The District Court (*The Wagner Quarries Company v. United States of America*, U. S. D. C., N. D. Ohio, Sept., 1957, 154 F. Supp. 655), in its opinion, when discussing the intention of Congress, stated (p. 662):

"Certainly they did not have in mind a grade of limestone suitable only for use by an industry that

required extremely high standards such as the limestone mined in the area on the east coast of Michigan between Alpena and St. Ignace, where the calcium carbonate content is 95 percent or more. If this is what the Congress had in mind, then I believe they would have so said, for this grade of limestone is exceedingly scarce and is not readily found in available quantities."

Lacking a statement of intention or definition from Congress, and lacking a definitive ruling by the Secretary of the Treasury, and absent a commonly understood commercial meaning in the industry of the phrase "chemical grade limestone," the question of a reasonable interpretation devolves upon the courts.

The taxpayer submits that the only reasonable interpretation follows common sense in the suitability of limestone for use in one of the chemical process industries. Cement is one such industry.

Since the chemical process industries vary in the chemical content of the limestone they require, any sort of a chemical content test would be inequitable and difficult to administer. On the other hand, the fact of suitability for chemical process use is easily ascertained and would promote uniformity of administration. Such an interpretation would fill the gap that now exists between the bare bones of the statute and industry's need for a clear, workable definition which will enable it to know where it stands.

Parenthetically, it should be noted that a rash of litigation has arisen in the courts over this very point, and cases are pending in other circuits. The litigation is due to the lack of consistent theory of interpretation by the Government which is apparently playing the cases by ear, taking the most advantageous position in each case regardless of consistency and hoping for a conflict in decisions.

Congress corrected this situation for tax years after 1954, by enacting the Internal Revenue Code of 1954, which provided depletion at the rate of 15% for *all* limestone except that used for aggregate, road building, etc.

F. The Government's Suggested Interpretation of "Chemical Grade Limestone," Apparently Adopted at Least in Part Below, Is Artificial, Arbitrary and Unreasonable.

The Government sought below to limit the term "chemical grade limestone" to limestones having a certain artificially specified minimum percentage (95%) of calcium carbonates content by grafting the words "high calcium" onto the statutory phrase "chemical grade limestone." Such a position is arbitrary, unwarranted by the statute, and places a gloss upon the statute which Congress never intended.

The trial court below, while holding that taxpayer's limestone was not "chemical grade" rejected the Government's "high quality" test [F. of F. No. XVI, R. 67] and held merely that "a limestone of a relatively high calcium carbonate content is known in industry and commerce as chemical or metallurgical grade limestone," but refused to specify how high was "high." The only evidence as to the use of the phrase in industry was that the industry had never used it.

Taxpayer submits that such an arbitrary 95% calcium carbonate test, or any percentage test, ignores the admitted and proven circumstance that the value of particular limestone in the production of cement and other chemical process uses lies, not only in its calcium carbonate content, but also in the degree of absence of undesirable *impurities*.

The words "impure," "pure" and "impurities" should be correctly understood. Webster's New International Dictionary (2d Ed., 1948) defines the terms as follows:

"Pure . . . 1. a. Separate from all heterogeneous or extraneous matter."

"Impure . . . not pure; spec.: . . . b. mixed or impregnated with something extraneous . . ."

"Impurity . . . condition or quality of being impure."

"Extraneous" is defined as "not essential or extrinsic."

Thus, we see that aside from its use with reference to food or drink, etc., as in "pure milk," or in connection with single elements, like "pure gold," "pure iron," etc., the word "pure" is a statement of a physical fact which may or may not be meaningful when applied to a particular chemical compound or substance. An illustration would be "pure" silver, which although more valuable than "sterling" silver is not useful commercially because of its softness.

Thus, the question of "impurities" is relative, rather than absolute. What is an "impurity" in a particular material for one chemical process or use, may be beneficial to another chemical process application, and what is beneficial to the former application or use, may be an "impurity" to the latter. The question of what is an "impurity" is not, in this reference, a constant, but is a variable based upon whether the substance in question is essential to or is extraneous to such chemical process. If it is extraneous, it is an "impurity." If it is essential to the chemistry it is a constituent element and forms one of the specifications for the desired raw material used in the process.

Applying this helpful analysis to the instant case, and comparing specifications for the two chemical industries—the alkalies and glass [Stip. of Facts No. 2, para. 14; R. 35-36] we find that a maximum of 1% iron oxide (Fe_2O_3) is permitted for some glass manufacture, while 3% is permitted in manufacturing alkalies. The limestone used for alkalies is thus clearly unsuitable for glass—although the Government contends both are “chemical grade limestone”—since the extra 2% of iron oxide permitted in alkali manufacture is a contaminant or “impurity” which would ruin the finished glass.

The arbitrary and artificial character of a percentage analysis or content test to determine “chemical grade limestone” is thus clearly exposed. In practical language—“one man’s meat is another man’s poison”; or, what may be a permissible calcium carbonate content for one chemical use may bar another equally recognized chemical use because of differing specifications.

As discussed, cement is produced by a complex chemical process, wherein, through extensive chemical changes in the constituent raw materials, entirely new chemical compounds are created. [R. 18, 129.]

In this regard, it is interesting to note that the Government has laid stress upon its contention that limestone used for the manufacture of cement is of an asserted “lower quality” than the limestone used, for example, to make glass. Such an approach begs the question. For the glass industry, like the cement industry, is a chemical process industry. It is true that the limestone commonly used to make glass has a different chemical composition than the limestone commonly used to make cement. The *specifications* for each chemical process (cement and glass) are *different*, but neither can be said to be of *higher quality* than the other. The attempted comparison is like attempting to compare orange juice and lemon juice, and saying that because orange juice

contains 1.35% citric acid and lemon juice contains 6.5% citric acid, that orange juice is “purer” or of higher quality than lemon juice.¹

The fact is that while the two fruit juices are different and each is unique, both are “commercial grade citrus juices.”

So it is with the cement industry and the glass industry. Both are chemical process industries. Both use limestone as a basic raw material. The specifications for the chemical content of such limestones are different because the other constituent raw materials and the end product are different in each case. However, it is patently error to say that glass limestone is “purer” or of “higher quality” than cement limestone. Both types of limestones have closely defined chemical contents, and both are used in a chemical process, combining with other raw materials to produce entirely new chemical compounds. Both, in short, are “chemical grade limestone.”

G. The Government's Artificial 95% Theory Is Inconsistent With Administrative Practice.

In Revenue Ruling 56-582 (C. B. 1956-2, 981), the Commissioner defined the word “lime” as used in Revenue Ruling 55-700, relating to the percentage depletion of limestone, as follows:

“The word ‘lime’ as used in the penultimate paragraph of Revenue Ruling 55-700, C. B. 1955-2, 369, means calcium oxide (CaO) manufactured by calcination of calcium carbonate (CaCO_3). Since such calcination is a chemical process, any natural deposit, including dolomite, which contains calcium carbonate and is used, or sold for use, by the mine owner or

¹“*Food Products*” Blumenthal Chem. Pub. Co. Brooklyn, N. Y. 1947, p. 758.

operator for manufacturing calcium oxide (lime) by calcination is 'chemical grade limestone' for percentage depletion purposes"

The crux of the ruling is that "calcination," is a "chemical process" and that therefore, limestone of *any* calcium carbonate content, which is calcined; or chemically processed, is defined as "chemical grade limestone."

The heart of the Portland cement process is the calcination or "burning" by which, under extreme heat (2400-2800° F) the carefully proportioned raw materials are broken down and converted by chemical reaction into entirely new compounds. [R. 18.] The Government must admit and does admit that if "calcination" in the manufacture of lime is a "chemical process," that the calcination of cement raw materials is a "chemical process." The Government must inevitably next admit that such calcination and formation of chemical compounds in the kiln, constituting a "chemical process," is the stage at which one can determine that a particular limestone is "chemical grade limestone" as shown in the Ruling. In other words, if the particular limestone in question is suitable for calcination and is calcined, then by definition it is "chemical grade limestone" and, of course, the Government has stipulated in this case that all taxpayer's limestone in the year 1951 was calcined and that such calcination resulted in the production of Portland cement. [R. 18-19, 26.]

To date, the Government has offered no reasonable explanation why it defines limestone which is calcined into lime by a "chemical process" as "chemical grade limestone" but refuses to concede that limestone which is calcined by a comparable "chemical process" into Portland cement is also "chemical grade limestone," except the purely artificial test or theory that the limestone used for lime is allegedly "higher grade." However, it should be noted that nowhere in the quoted Ruling is there the sug-

gestion that the ultimate classification of "chemical grade limestone" depends upon the "quality" of limestone expressed in terms of carbonates content. The Ruling is phrased and framed upon the proposition that the chemical conversion of the limestone into new compounds by calcination is the criteria for determining whether or not particular limestone is in fact "chemical grade limestone."

H. The Provision of the Statute Providing That "Chemical Grade Limestone" Be Allowed a 15% Depletion Allowance Is Specific and Free From Ambiguity.

As heretofore discussed, for the reasons stated, taxpayer submits that the words "chemical grade limestone" are clear and unambiguous, and that the arbitrary and artificial 95% test standard or theory adopted and pressed by the Government below has no support in fact or in law.

The Government's 95% theory has no support in fact because, as discussed above, limestone of varying calcium carbonate content is extensively used in the different chemical industries. The particular industry and the end product determines the required specification for calcium carbonate content. As discussed, the presence or absence of other materials in varying percentages is a function of the particular chemical process or product, and does not reflect an acceptance or understanding by the industry that a particular type of limestone is "chemical grade limestone," which, because of a lack of need generally in industry for the use of this expression, does not have a "trade significance." Still, such English words used separately in industry are clear and unambiguous.

Had Congress intended to limit the 15% depletion rate to limestone containing 95% calcium carbonate or more, it could easily have used the words "high calcium limestone."

The Government, however, is attempting to forcibly transpose "chemical grade limestone" into "high calcium limestone," and, thus add a new dimension to the statute unintended by Congress.

This is yet another illustration of the old saying—"The big print giveth, and the fine print taketh away"—the big print here being the statute and the fine print being the Government's attempted gloss or "improvement" on the statute—not even by Regulation, but by the expediency of litigation.

The Government's 95% theory has no support in law, in that there is nothing in the statute or in its legislative history which tends to show any intention of Congress that "chemical grade limestone" was a "special," "refined," or "limited" type of limestone usable and suitable in some chemical industries but not in others.

In any event, the provisions of the statute involved are specified and free from ambiguities. In such a situation there is no room for an interpretation by the Commissioner or by the Courts which would vary downward the stated rate of 15% for limestone which is suitable for use in any chemical process industry, and hence is, by definition, "chemical grade limestone."

I. The Internal Revenue Code of 1954.

We have appended to this brief (Appendix "A") the pertinent provision of the 1954 Code relating to percentage depletion, although the Court will understand, as did the District Court, that the decision of the issues in this case involves only the calendar year 1951, and that the years subsequent to years 1953 are governed by the 1954 Code, and are in no way affected by the decision in this case.

In the 1954 Code, Congress adopted a modified end-use test, in that although "limestone" is given a 15% rate of depletion, the mine owner is entitled to only 5% when

such limestone is used or sold for use as riprap, ballast, road material, rubble, concrete aggregates, or for similar purposes. Thus, under the 1954 Code, if limestone is used for any purpose other than those just stated, it is entitled to the 15% depletion rate.

Although, as stated, the 1954 Code is not applicable here, it is interesting to note that Congress has clarified the depletion provision of the statute, and, by adopting the modified end-use test has clearly provided that *all* limestone used in any chemical process industry (including cement), regardless of calcium carbonate content, and regardless of the content of other substances, is entitled to the 15% rate.

Congress was, no doubt, aware of the controversy between the industry and the Government as to the proper interpretation of "chemical grade limestone." Congress clearly rejected the end-use test proposed by the Government in T. D. 6031 (C. B. 1953-2, p. 121) and also rejected the 95% calcium carbonate content test pressed by the Government herein, and instead adopted the practical line or division between the limestones actually used in the chemical industry of all types, and the limestones used for the inferior purposes, such as road building, etc., set forth in the statute.

J. The Testimony of Dr. Bowles Demonstrates That His Definition of "Chemical Grade Limestone" Arises From a Misapprehension of What Makes an Industry Chemical or Non-chemical.

The gist of Dr. Bowles' testimony is that "chemical grade limestone" is limestone used by "chemical industries" and an industry is a "chemical industry" *only if* it uses "chemical grade limestone." There is no break in this circle of reasoning, and it bears no relation to the objective, demonstrated actual fact that there are indus-

tries commonly classified as chemical industries, which use limestone other than the high calcium limestone Dr. Bowles believes to be “chemical grade.”

Dr. Bowles’ testimony is thus clear that his interpretation of “chemical industry” was tailored to fit. Instead of a reasonable classification based upon the chemical character of the processes used, or the chemical character of the products produced, Dr. Bowles classified industries as “chemical” or “non-chemical” solely upon the calcium carbonate content of the limestone they used, thus excluding admittedly chemical process industries such as cement.

Such a position is demonstrably fallacious. First, it involves circuitous reasoning. Dr. Bowles reasons:

1. “Chemical industries” are only those which use high calcium carbonate limestone;
2. Only limestone used by “chemical industries” is “chemical grade limestone”;
3. Therefore, only high calcium carbonate limestone is “chemical grade limestone.”

Obviously, Dr. Bowles’ major premise is unsound. Factually, an industry is chemical or non-chemical because of its processing or because of its product, or both, not because it utilizes one particular material in specified proportions.

K. Conclusion on “Chemical Grade Limestone.”

For the reasons stated, taxpayer submits that this Court should define “chemical grade limestone” to include limestone suitable for use in the industrial chemical process of making cement, and in all other respects affirm the judgment below.

VII.

THE GOVERNMENT'S CROSS-APPEAL.

By its cross-appeal herein the Government has attempted to present two issues for determination:

1. It attempts to repudiate its stipulations made and positions taken below which support the trial court's findings relating to the exclusion of the costs of bagging from the ordinary treatment processes for percentage depletion purposes; and,
2. It attempts to repudiate its stipulations made below which support the trial court, and challenges the trial court's inclusion of the costs of mineral materials necessarily added to its limestone in order to obtain finished cement.

A. The District Court Committed No Error in Ruling That Appellant's Bagging Operation Should Be Excluded From the Ordinary Treatment Processes for Percentage Depletion Purposes nor in the Method It Ruled Should Be Used in Computing Such Exclusion.

1. The District Court's Findings on Bagging Issue.

The relevant and pertinent findings of fact and conclusions of law with regard to the bagging question are as follows:

Finding of Fact IV.—At the completion of the processes referred to above, the cement was stored in silos from which *it was loaded and shipped in bulk; or from which it was bagged and loaded and shipped in bags.* (Emphasis added.)

Finding of Fact VI.—The only product sold by plaintiff during the year 1951 as a result of its limestone mining operations was *Portland cement in bulk and in bag or sack containers.* (Emphasis added.)

Finding of Fact IX.—During the year 1951, 63.49% of plaintiff's cement sales were of bulk cement. *The remaining sales were of cement placed in bag or sack containers.* (Emphasis added.)

Finding of Fact XI.—The commercially marketable mineral product obtained by plaintiff from mining during the year 1951 was *bulk Portland cement* at its plant at Monolith, California. (Emphasis added.)

Finding of Fact XII.—*The cost of bags and sack containers and the costs attributable to bagging and sacking are not ordinary treatment processes* normally applied by mine owners or operators to obtain the commercially marketable mineral product Portland cement in bulk form. (Emphasis added.)

Finding of Fact XIII.—*The additional charge made by plaintiff on its sales of Portland cement sold in containers is to be eliminated* from its gross sales in order to arrive at "gross income from mining." Also to be eliminated from gross sales are royalties, trade discounts, contract trucking and own fleet trucking costs, rail freight, and warehouse and bulk storage plant costs at distribution points away from plaintiff's cement plant. (Emphasis added.)

Finding of Fact XIV.—In computing net income from mining, the following items are to be eliminated from expenses: trade discounts, contract trucking and own fleet trucking costs, rail freight, warehouse and bulk storage plant costs at distribution points away from plaintiff's cement plant, and *cost of bags and costs attributable to bagging.* (Emphasis added.)

Conclusion of Law V.—The commercially marketable mineral product obtained by plaintiff was *bulk Portland cement at its plant in Monolith, California*, located within a distance of fifty (50) miles from the quarry operated by plaintiff. (Emphasis added.)

Conclusion of Law VI.—Plaintiff is entitled to a depletion allowance at the rate hereinabove set forth on its gross sales of bulk cement f.o.b. its plant at Monolith, California, but adjusted for the items as set forth in the findings of fact herein and limited to fifty (50) per centum of the net income for mining as adjusted for the items as set forth in the findings of fact herein. (Emphasis added.)

Conclusion of Law VII.—Bagging and costs attributable to bagging are not ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product bulk Portland cement. (Emphasis added.)

Conclusion of Law X.—The items of royalties, trade discounts, trucking (contract and own fleet costs), rail freight, warehouse and bulk storage plant costs at distribution points away from plaintiff's cement plant, *additional charge for sales in bags, costs of bags and bagging expense are to be eliminated from gross sales from mining and from net income from mining* as set forth in the findings of fact herein. (Emphasis added.)

2. The Government's Claimed Error on Bagging.

Appellee now specifies (in its cross-appeal) error by the District Court with regard to the bagging question with the designation of the following point upon appeal:

“The District Court erred in determining that the taxpayer, in computing its ‘gross income from mining’ of calcium carbonate, is entitled to exclude the cost of bags in which the cement is sold and the cost of the bagging process.”

This designation by the appellee is unclear and ambiguous when considered with the District Court's findings of fact and conclusions of law (see findings of fact and conclusions of law quoted above).

3. The Government Is Attempting to Change Its Trial Court Theory on Bagging.

Appellant presumes appellee has no objection to the findings of fact and conclusions of law which declare the bagging process is not an ordinary treatment process, because: (1) appellee acquiesced in the principle of excluding the bagging process in the proceedings below; and (2) in all other reported cases relating to percentage depletion, appellee has taken the position, where containers are involved, that the process applied to place a product in containers is not an ordinary treatment process for percentage depletion purposes.

a. APPELLEE ACQUIESCED IN THE EXCLUSION OF BAGGING PROCESS.

Appellee obtained several delays of the trial upon stipulations [Exs. 25, 27 and 24] which represented to the court that principles for settlement had been agreed upon. One of these principles was that the bagging operation or process applied by appellant should be excluded from the ordinary treatment processes in the computation of percentage depletion. (See Exhibits attached to Affidavit *in re* March 17, 1958 Hearing [Clk. Tr. pp. 402-421].)

During the trial the appellee persisted in the position that the bagging process should be excluded. This is shown by the following excerpt from the Reporter's Transcript:

(1) Reporter's Transcript of March 21, 1958, page 92, line 18, to page 93, line 16 [R. 99-100]:

"The Court: Do you contend that bags and bagging should be included?

Mr. O'Brien: Your Honor, I am only trying to inquire—

The Court: No. Answer that question, and then we can talk. I am not interested in some academic theory. I am interested in the real controversy.

If the Government doesn't contend that this should be included, if you are both agreed upon it, let's drop the subject .

Mr. O'Brien: Well, in principle, the Government would agree with the theory—

The Court. All right. Let's drop the subject. Step down, Mr. Neuhauser. Call your next witness. Let's move on.

Unless you have something more?

Mr. O'Brien: Well, if the witness would stay here for a second, your Honor, and let me please try to explain the problem as we see it.

We have an over-all operation of this cement business, where the loss on the bagging operation, taxpayer wants to exclude as non-mining cost all of the costs on the non-mining cost basis. Therefore, he is increasing his percentage depletion allowance by eliminating this cost.

The Court: Yes. But you are agreeing with him.

Mr. O'Brien: In principle."

And again, on the following day in court, appellee's counsel conformed to this position:

(2) Reporter's Transcript of March 24, 1958, page 171, line 24, to page 172, line 14 [R. 113]:

"The Court: The question is, will the bagging stage be included, or is the cut-off point at which the cement becomes marketable short of the bagging stage? And you have agreed that it is? Both sides have agreed that it is?

Mr. O'Brien: Yes.

The Court: And it so happens that by so agreeing in this situation the figures on the books are such that it causes this loss and that it adversely affects the Government when dealing with those figures.

What I have suggested is that the true situation is shown by not dealing with bags and bagging figures at all. Deal with figures that don't appear on the books; namely, the figures that would exist if all this cement had been sold in bulk as the cut-off point. And when you do that, you don't even talk about these costs and 40 cent recovery and so forth, do you?"

Appellant submits it is clear appellee's position during the trial of this action in the District Court below was that appellant's bagging operation or process should be excluded from the ordinary treatment processes for percentage depletion purposes, because such process is not a part of "mining" within the scope of the percentage depletion statutes.

b. APPELLEE HAS NEVER TAKEN POSITION CONTAINERS SHOULD BE INCLUDED.

In all actions to date relating to the percentage depletion statutes involved herein, appellee has consistently taken the position any process or processes pertaining to the placing of a product of a mine in containers is not an ordinary treatment process within the scope of the percentage depletion statutes. See:

Dragon Cement Company v. United States (June 23, 1958, U. S. D. C., Me.), 163 Fed. Supp. 168;

United States v. Utco Products, Inc. (June 10, 1958, C. A. 10th), 257 F. 2d 65;

American Gilsonite Company v. Commissioner of Internal Revenue (April 29, 1957), 28 T. C. 194;

Townsend v. Hitchcock Corp. (April 9, 1956, C. A. 4th), 232 F. 2d 444;

International Talc Co. v. Commissioner of Internal Revenue (1950), 15 T. C. 981; and

New Idria Quicksilver v. Commissioner of Internal Revenue (Sept. 22, 1944, C. A. 9th), 144 F. 2d 918.

In not one of these cases involving the percentage depletion statute involved herein has appellee ever taken the position that a process relating to the placing of a product in containers is includible within the ordinary treatment processes.

It is clear appellee not only failed to make an issue of appellant's exclusion of the bagging process from its ordinary treatment processes, but, in fact, never intended to take such a position. To permit appellee to now take that position and, on this appeal, treat it as an issue in the case is prejudicial and unfair to appellant.

4. The Trial Court Found as a Fact That the Bagging Process Was Excludible. The Evidence Clearly Supports Such Finding.

Even if appellee is permitted to change its theory and to now take the position on this appeal that the bagging process applied by the appellant should be included within the ordinary treatment process under the percentage depletion statutes, its position is without merit and contrary to the undisputed evidence.

In the *Dragon*, *Hitchcock*, *International Talc* and *New Idria* cases, cited above, the bagging or packaging processes were held to be includible within the ordinary treatment processes referred to in the percentage depletion statutes. However, the facts involved in those cases were substantially different from the facts in this present action. In each of those cases the container question was treated as a question of fact, and it was established that it was necessary for the taxpayer to package

his product from the mine in order to market it. Only in the *Dragon Cement Company* case (163 Fed. Supp. 168, 172), where about 50% of the products was sold in bags, did the taxpayer market less than all of the particular product in such packages or containers. In the *American Gilsonite* case (28 T. C. 194, 198), none of the crushed gilsonite was sold except in containers. In the *Hitchcock* and *International Talc* cases (232 F. 2d 444 and 15 T. C. 891), none of the pulverized or powdered talc or talc crayons were sold except in containers. And, in the *New Idria* case (144 F. 2d 918), none of the mercury was sold except in containers.

In the case under consideration here, the product sold in containers (cement) was also sold without the containers. In fact, 63.49% of the product was sold without containers during the year involved. [Finding of Fact IX, R. 65.]

The important principle established by the cases holding that a packaging process should be included is the principle that the packaging question is a question of fact. It is a question of whether the process or processes of placing the product of a mine in packages or containers is an ordinary treatment process normally applied by mine owners or operators in order to obtain the commercially marketable product. That question was answered in the negative by the District Court below in this action. The court's conclusion is supported by the undisputed evidence.

Witness Gillette testified as follows, in respect of this question:

1. Reporter's Transcript, March 21, 1958, page 119, line 18, to page 120, line 19 [R. 109-110]:

"Q. By Mr. O'Brien: The principal market that Monolith has is for bulk sales, according to your Exhibit No. 31. Is that true? A. Yes. In 1957 our shipments were 76.89 per cent bulk.

Q. And for the year 1951? A. 63.49 per cent bulk.

Q. And what were the percentages for bagged cement for the year 1951? A. Well, the difference, which would be 36.51 per cent.

Q. And for the year 1957? A. 23.13 per cent.

Q. For the cement industry that comprises your competitors that you previously described, are your percentages fairly representative of the market conditions? A. Yes, I think they are. Because if you will note, most of the construction nowadays is furnished by transit mix dealers. Now, your transit mix people receive cement in bulk. And so, all the cement that is sent by transit mix—all the concrete that is sent by transit mix has been previously shipped to that dealer in bulk. They do it because of the ease of handling, reductions of cost. And, of course, your labor costs are playing quite a factor in it, now. There was a time when we handled things by hand, but it just—nowadays most everything is handled in bulk, as far as you can.”

Exhibit 31 [R. 140] shows the proportion of appellant's bulk and sacked sales during the years 1951 to 1957. From this evidence alone, the trial court could draw the inference that the marketable product was bulk cement. It did draw such an inference, based on the fact that appellant could have sold its entire output of cement in bulk.

To summarize this testimony, appellant's marketable product was bulk cement without packages or containers. It did market some cement in bags, but under the evidence could have marketed all cement in bulk.

In the *Dragon Cement Co.* case (163 Fed. Supp. 168), the court stated (p. 172):

“. . . During the tax period here involved approximately 50% of taxpayer's cement was actually sold

in bags, and it must be inferred from the stipulation that it could only be so sold. Without such packaging the record thus establishes that approximately one-half of plaintiff's product cannot actually be considered to be commercially marketable. Insofar as that portion of this taxpayer's market is concerned, therefore, the bagging procedure is an ordinary treatment process normally applied and essential for the marketing of the mineral product."

Consequently, the inference is not, as in the *Dragon* case (where 50% was sold in bags), that such cement could only be so sold. Rather, the trial court properly drew the inference that the appellant's marketable product was bulk cement, because but 36% was sold in sacks in 1951, which had dwindled to 23% in 1957.

In the *Utco Products* case cited above, the Court of Appeals for the Tenth Circuit excluded the bagging process from the ordinary treatment processes for percentage depletion purposes. That court appears to have considered the bagging issue as a question of law. If it had considered it a question of fact, it would have undoubtedly included the bagging process because it was clear the product involved (expanded perlite) had to be packaged in order to be marketed. There was no market for the perlite in bulk. (257 F. 2d 65, 66.)

The Tenth Court stated as follows (257 F. 2d 65, 68):

"We are of the opinion that the phrase 'ordinary treatment process,' except where the statute otherwise provides, means a process of treating which separates the mineral from other minerals in which it is found or with which it is associated, or which effects a chemical or physical change in the mineral itself, such as crushing, separating, removing impurities, pulverizing, hardening and the like.

“When the perlite has been expanded it requires no further change, either physical or chemical in the mineral itself or any separation from other matter to render it marketable. Clearly, placing the material in bags effects no change in the mineral itself and is not an ordinary separation process.”

In the *American Gilsonite* case (28 T. C. 194, 198), none of the crushed gilsonite was sold in bulk. All was sold in containers. Although the Tax Court held the packaging process includible, its decision was reversed by the Court of Appeals (September 25, 1958, 259 F. 2d 654) upon the authority of the Court's decision in *United States v. Utco Products Inc.*, 257 F. 2d 65 (June 10, 1958, C. A. 10th).

In the case of appellant's mineral product, after the fine-grinding of the finished cement, no further change, either physical or chemical, is required “to render it marketable.”

Whether the bagging issue is treated as one of fact or law, no error was committed by the District Court below in ruling for the exclusion of appellant's bagging process from the ordinary treatment processes that are normally applied in order to obtain the commercially marketable product, and the undisputed evidence supports such findings.

If appellee is not taking the position that the District Court below erred in excluding appellant's bagging process from the ordinary treatment processes, it is presumed appellee's second point on appeal raises some issue as to the method of computing the exclusion agreed to or acquiesced in.

5. Method of Excluding Bagging Process From Percentage Depletion Computation.

The point on appeal asserted by appellee is that there was error in excluding “the cost of bags in which the cement is sold and the cost of bagging process” in the com-

putation of "gross income from mining." The court below did not make such a determination. Instead, the court held: (1) that the additional income received by appellant by reason of selling cement in bags should be excluded from total income in order to determine "gross income from mining" under the percentage depletion statutes [Finding of Fact XIII; R. 65; Conclusion of Law X; R. 72]; and (2) that the additional expenses incurred by appellant by reason of preparing cement for sale in bags rather than in bulk should be excluded from the total mining expenses in order to determine the "net income from mining" under the percentage depletion statutes [Finding of Fact XIV; R. 66; Conclusion of Law X; R. 72.] The effect of these rulings of the court below is merely to take the bagging operation completely out of the percentage depletion picture, to treat appellant's whole operation as though the bagging operation or process was no part of "mining," or, to treat appellant's operation as though all sales were in bulk. As the District Court stated:

"What I have suggested is that the true situation is shown by not dealing with bags and bagging figures at all. Deal with figures that don't appear on the books; namely, the figures that would exist if this cement had been sold in bulk as the cut-off point." [Rep. Tr. of March 24, 1958, p. 172, lines 8-12.]

and,

"They (bagging income and expenses) are not in the computation at all, as I view it." [Rep. Tr. of March 24, 1958, p. 174, lines 20-21.]

Appellant contends the method suggested and ruled by the District Court below is the only feasible and practical manner of excluding an operation or process from other operations or processes in order to arrive at a conclusion relative to the group of operations or processes remaining.

This is a type of cost-accounting question in that it asks for a dollar analysis of a part of the whole. To exclude any operation or process by any method other than the one where all the income and expenses attributable thereto are excluded or eliminated, would be unrealistic and arbitrary.

The evidence is undisputed that the income received by appellant from bags is \$389,350.00, or .40¢ per barrel of cement sold in bags. [Ex. 29; Rep. Tr. of March 21, 1958, p. 55, line 4, to p. 56, line 18 [R. 78]; p. 77, lines 12-15 [R. 91]; p. 88, lines 19-23 [R. 96]; p. 90, lines 1-13 [R. 97]; p. 107, lines 11-21 [R. 106]; p. 108; lines 17-21 [R. 107].] When appellant sells cement in bags it adds 40¢ per barrel to the price normally charged for cement sold in bulk. Therefore, if the income attributable to the bagging operation or process is to be excluded from the income relating to other operations and processes, it is a simple matter of deducting 40¢ times barrels of cement sold in bags (\$389,350.00) from the total income from all operations. This is the method followed by the District Court below. [Finding of Fact XIII; R. 65.]

The evidence is likewise undisputed that the expenses incurred by appellant in selling cement in bags rather than in bulk are \$771,119.85 [Ex. 29; Rep. Tr. of March 21, 1958, p. 56, line 19, to p. 60, line 11 [R. 79-82].] This figure includes \$344,917.73, incurred by appellant in purchasing the bags actually used, and \$426,202.12, incurred in the process of placing and loading cement into the bags. It is true, that the \$426,202.12 relating to the process of loading and placing cement in bags is an apportionment of overhead expenses and the total expenses incurred by appellant in its packing and loading department (which includes the loading of bulk cement) but appellant's evidence (the only evidence) was that the apportionment made was reasonable if not conservative. [Rep. Tr. of March 21, 1958, p. 56, line 19, to p. 60, line 11 [R. 79-82].] The trial court alone should and did determine

the question. Therefore, if the expenses attributable to the bagging operation or process are to be excluded from those expenses relating to other operations and processes, it is a simple matter of deducting the cost of the bags used and the cost of packing and loading the cement into bags from the total expenses relating to all operations. This is the method followed by the District Court below. [Finding of Fact XIV; R. 66.]

The result in the present action is that appellant's "net income from mining" for percentage depletion purposes is greater than appellant's net income from all its operations. This apparently is the objection which the appellee has to the lower court's method of computing percentage depletion. Appellee seems to believe it impossible for a business organization to realize a loss upon one operation or transaction while realizing a profit on other operations or transactions. Actually, this is probably the history of all business.

In any event, the profits or losses in the process step departments is a pure question of fact. Witness Neuhauser stated [Rep. Tr. of March 21, 1958, p. 98, lines 20-25 [R. 105]]:

"Well, if we were accounting, Mr. O'Brien, for departments and profitability of departments, I wouldn't take the income of one department and apply it against the loss of another department. The purposes of departmental accounting would be to see what departments are producing income and what departments are producing a loss."

Appellant believes that appellee realizes there is only one sound and fair method of excluding the bagging process from the percentage depletion computation, and that is the method adopted by the District Court below. It is a mere fortuitous circumstance that the application of this method is disadvantageous to the appellee in this case,

when the 50% of net income limitation is applied. In fact, all taxpayers who are not subject to the 50% of net income limitation would lose to the benefit of the Revenue Department.

B. The District Court Committed No Error in Ruling That There Should Be No Exclusion From Mining Income or Mining Expenses by Reason of Appellant's Adding Certain Mineral Materials to Its Limestone in Order to Obtain Finished Cement.

The Government, by its Statement of Points on Appeal [R. 148], now asserts that when determining taxpayer's "gross income from mining" the trial court erred in failing to exclude an arbitrarily assumed income attributable to the other minerals necessarily admixed with limestone in the usual and necessary process steps of producing cement.

By this assertion, the Government attempts to repudiate its definitive written stipulations deliberately made below, and challenges the trial court's relevant Findings of Fact.

The Government is now barred from reversing its trial court theory under familiar principles of appellate review. In addition, even if it could now successfully repudiate its stipulations, it would still carry the heavy burden of showing that the trial court's Findings of Fact were clearly erroneous. And this, on the undisputed record, it cannot do.

The only possible basis for excluding "additives" from the computation of "gross income from mining" in this case would be by virtue of a finding of fact that the addition of such other materials to taxpayer's limestone are not "ordinary treatment processes normally applied . . . in order to obtain the commercially marketable mineral product . . ."—finished cement.

For if the addition of such materials is an “ordinary treatment process,” the statute clearly and unequivocally directs that such items are includible in “gross income from mining.” (Sec. 114(b)(4)(B).)

1. The Government’s Point.

Appellee now specifies (in its cross-appeal) error by the District Court with regard to the materials added by taxpayer to its limestone and the trial court’s failure to make exclusions therefor with the designation of the following point upon appeal:

“1. The District Court erred in determining that the taxpayer, in computing its ‘gross income from mining’ of calcium carbonate, on the basis of which a 10% depletion deduction is allowable under 1939 Code Sections 23(n) and 114(b)(4), is entitled to include income attributable to other products (‘additives,’ some of which were purchased and some mined by taxpayer) which it combined with the calcium carbonate in order to manufacture and sell Portland cement.”

By this designation, the appellee apparently contends that those processes involving the addition of relatively small amounts of other materials should be excluded from the computation of percentage depletion. In addition, it appears that appellee would restrict its proposed exclusion to matters of income only without at the same time excluding the expenses attributable to the additives.

2. The Government’s Stipulations Below Bar Such Point on Appeal.

The appellee stipulated that those steps or processes applied by appellant where the other materials are blended with limestone are includible in determining gross income from mining as follows [Stip. of Facts No. 1, para. VIII, H; R. 21, 22]:

“The parties to this action agree that the extraction and processing operations set forth below for the mining of the calcium carbonate rock generally known as ‘limestone’ are includable in determining gross income from mining under section 114(b) of the Internal Revenue Code of 1939, as amended, and were employed by plaintiff at its quarry and cement plant at Monolith, California, during the year 1951 in order to obtain various types of Portland cement.”

* * * * *

“H. The limestone from its hopper is then blended with clay # 1 from another hopper, with clay # 2 from another hopper and with iron cinders from another hopper by measuring and conveying equipment.”

The Government also stipulated that the addition of gypsum at the finish grind stage was included in the ordinary treatment processes normally applied in the cement industry. [Stip. of Facts No. 1, paras. IX, B and X; R. 23, 24.]

In addition, the parties to this action stipulated to the minute physical and chemical details concerning the additive materials [Stip. of Facts No. 1, paras. V-VII; R. 18-21]; and that all steps or processes applied by appellant in order to obtain finished cement are the usual and customary process steps applied in the cement industry to obtain finished cement. [Stip. of Facts No. 1, para. X; R. 24.]

It is obvious then that appellee is not now in a position to argue that the processes or steps relating to the addition of other materials to limestone are not ordinary treatment processes within the meaning of Section 114(b)(4)(B) of the Internal Revenue Code of 1939.

3. Following a Full Consideration, the Trial Court Found the Addition of "Additives" to Be Usual and Customary or "Ordinary Process Steps Normally Applied" to Obtain the Marketable Product Cement From the Limestone Mined.

The relevant and pertinent Findings of Fact and Conclusions of Law with regard to the additive question are as follows:

Finding of Fact III.—During the entire year 1951 plaintiff mined a calcium carbonate rock generally known as "limestone," which it processed by the usual and customary process steps applied in the cement industry to obtain any of the various types of Portland cement. Said processes were applied by plaintiff at its cement plant at Monolith, California, adjacent to the quarry from which plaintiff mines the limestone. The process of heating or calcining of the materials used by plaintiff caused chemical changes to occur in them to obtain cement.

Finding of Fact VI.—The only product sold by plaintiff during the year 1951 as a result of its limestone mining operations was Portland cement in bulk and in bag or sack containers.

Finding of Fact X.—In the principal marketing area served by plaintiff, the market for limestone such as plaintiff mined at its quarry was negligible unless it was processed to obtain cement.

Finding of Fact XI.—The commercially marketable mineral product obtained by plaintiff from mining during the year 1951 was bulk Portland cement at its plant at Monolith, California.

Conclusion of Law II.—Plaintiff, as mine operator, mined a calcium carbonate rock generally known as "limestone" which it processed to obtain any of the various types of Portland cement.

Conclusion of Law V.—The commercially marketable mineral product obtained by plaintiff was bulk Portland cement at its plant in Monolith, California, located within a distance of fifty (50) miles from the quarry operated by plaintiff.

All of such findings are fully and clearly supported by all the evidence. Any attempt to attack such findings must be justified by a demonstration that they are “clearly erroneous.” In the absence of any evidence favorable to the Government on this issue, appellant submits such charge to be a frivolous one.

4. The Government’s Untimely Change in Additives Theory Below.

After appellee submitted “Defendant’s Proposed Findings of Fact, Conclusions of Law and Judgment,” it later filed another document relating thereto which was entitled “Defendant’s Proposed Amendments to Proposed Findings of Fact and Conclusions of Law Lodged by Defendant on April 4, 1958.” [Clk. Tr. on App., pp. 444-451.] The “proposed amendments” provided for the exclusion of the additive materials from the computation of percentage depletion and included a computation of the allowable percentage depletion and the refund due on that basis.

The District Court below allowed appellee a hearing on these “proposed amendments.” At that hearing, appellee took the position that to include the additive materials within the computation of appellant’s percentage depletion deduction resulted in:

- (1) percentage depletion on mineral materials for which the depletion statutes had not provided; and

- (2) in the case of additive materials purchased by appellant from others, a duplication of depletion, because appellant was in effect acquiring a depletion allowance on materials upon which the original mine operator had probably already obtained depletion.

The District Court below rejected appellee's proposed amendment to exclude the additives on the ground they were without merit and untimely. [Court's Order of April 14, 1958, Clk. Tr. on App., p. 475.] The lower court stated [Rep. Tr. of April 14, 1958, p. 3, line 6, to p. 4, line 9]:

"The Court: You received some additional instructions from Washington, I take it, Mr. Messer?

Mr. Messer: Yes, your Honor.

The Court: Well, they are a little late and they're a little unmeritorious, shall I say.

Mr. Messer: On the proposed amendment, your Honor?

The Court: Yes. The government could just as well contend that the labor is not depleted, either. This is a tax on gross income limited by net income, is it not?

Mr. Messer: That's right, your Honor. And it's on gross income from mining, or from the property, which means mining; and we are concerned with limestone, which is the depletable mineral involved here.

The Court: As I view it, everything that goes in that to make it a commercially marketable product is part of it—it goes into the sales price—everything up to where it can be sold. Otherwise, why come in here and talk about the clay or the gypsum. Why don't you talk about the labor and the electricity and the power?

Mr. Messer: That's part of the processing of the lime, which is depletable material.

The Court: Putting the clay and the silica and cinders and the fluorspar in is also part of the process, isn't it? Part of making it a marketable mineral property.

I just don't see that there's anything to the government's motion.

I must say that the government certainly dies hard on this issue."

Appellant would like to add that what the District Court below stated applies to all mining operations. All mine operators utilize labor, electricity or other forms of power, machinery and equipment, and many utilize water as does appellant, in order to complete the processing of the mineral mined. Under the percentage depletion statutes, these items, being parts of process steps, are subject to depletion. Certain income and expenses relate to these items, and to the extent they do, depletion is allowed thereon. This result is clearly justified. The percentage depletion statutes refer to the "ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product." It is a question of fact for the trial court to determine whether the item questioned falls within a process step. If the Court finds that it does, it is improper to exclude the item.

The blending of additives with the limestone qualifies as an ordinary treatment process and, therefore, it is improper to exclude the additives.

As to the Government's argument of duplication of depletion, any superficial logic it might possess is destroyed by its inconsistency. Duplication of depletion is not unique. Some overlapping and duplication is inevitable in order to achieve a practical, consistent application of the statute. For example, appellant utilizes a great amount of fuel oil or gas in its rotary kiln sintering process step. The same is true of many other mine operators in other industries such as brick kilns or the production of mercury from heated cinnabar ore in the *New Idria* decision of this Court hereafter quoted. How-

ever, the appellee does not contend for the exclusion of fuel oil or gas in this or any other case even though some other operator has heretofore probably obtained a 27½% depletion allowance thereon.

Therefore, neither of appellee's arguments for the exclusion of additives is convincing. Appellant also submits that the additives question is simply a question of fact as to whether or not the addition and blending of other materials with appellant's limestone is an ordinary treatment process normally applied in order to obtain the commercially marketable mineral product. The District Court below found appellant's finished cement, ready for shipment in bulk, to be appellant's commercially marketable mineral product. [F. of F. No. XI, R. 65; Concl. of Law No. V, R. 70.] The appellee stipulated that the addition and blending of other materials with limestone to be a usual and customary step to obtain finished cement, and the court so found. It did not appeal such ruling or from the ruling that finished cement was appellant's commercially marketable product. Therefore, it may not at this late date change its theory and create a new disputed issue of fact in the face of the record.

5. The New Idria Decision Confirms the Correctness of Including Additives.

In *New Idria Quicksilver Mining Co. v. Commissioner of Internal Revenue* (1944), 144 F. 2d 918, this Court considered another percentage depletion case involving additives and held depletion to be based on the final commercially marketable mineral product without reduction or exclusion for any other mineral added during the processing steps. The Court held in that case that under the percentage depletion statutes, gross income from mining cinnabar ore was the income from the sales of mercury. Mercury was obtained from the cinnabar ore un-

der a process, which, as recited by the Court's opinion, required the admixing of lime with the cinnabar ore in the ordinary process steps. (See 144 F. 2d 918 at 919.)

6. The Government's Inconsistent Position.

The Government's present position on additives is directly contrary to the position it took in *Northwest Magnesite Co. v. United States*, 58-1 USTC Para. 9394 (D. C. E. D. Wash., 1958). That case involved the addition of iron oxide to the kiln feed (comparable to Monolith's process step). The Government sought no allocation or exclusion, and none was made.

Conclusion.

For the reasons stated, the judgment of the United States District Court and the Findings of Fact and Conclusions of Law upon which it is expressly based, should be modified by striking the word "not" in the sentence beginning "The calcium carbonate content, etc." from Finding of Fact V [R. 64]; striking the word "not" in the sentence beginning "The calcium carbonate rock mined by plaintiff, etc." from Conclusion of Law IV [R. 70]; and substituting the words and figures "fifteen (15)" for the words and figures "ten (10)" in Conclusion of Law IV [R. 70].

The judgment should be affirmed in all other respects.

Respectfully submitted,

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APPENDIX "A."

Internal Revenue Code of 1954.

(Title 26, United States Code Annotated)

"§613. Percentage depletion

"(a) General rule.—In the case of the mines, wells, and other natural deposits listed in subsection (b), the allowance for depletion under section 611 shall be the percentage, specified in subsection (b), of the gross income from the property excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 percent of the taxpayer's taxable income from the property (computed without allowance for depletion). In no case shall the allowance for depletion under section 611 be less than it would be if computed without reference to this section.

"(b) Percentage depletion rates.—The mines, wells, and other natural deposits, and the percentages, referred to in subsection (a) are as follows:

* * * * *

"(6) 15 percent—all other minerals (including, but not limited to, aplite, barite, borax, calcium carbonates, refractory and fire clay, diatomaceous earth, dolomite, feldspar, fullers earth, garnet, gilsonite, granite, limestone, magnesite, magnesium carbonates, marble, phosphate rock, potash, quartzite, slate, soapstone, stone (used or sold for use by the mine owner or operator as dimension stone or ornamental stone), thenardite, tripoli, trona, and (if paragraph (2)(B)

does not apply) bauxite, beryl, flake graphite, fluor-spar, lepidolite, mica, spodumene, and talc, including pyrophyllite), except that, unless sold on bid in direct competition with a bona fide bid to sell a mineral listed in paragraph (3), the percentage shall be 5 percent for any such other mineral when used, or sold for use, by the mine owner or operator as rip rap, ballast, road material, rubble, concrete aggregates, or for similar purposes. For purposes of this paragraph, the term 'all other minerals' does not include—

“(A) soil, sod, dirt, turf, water, or mosses;
or

“(B) minerals from sea water, the air, or similar inexhaustible sources.

“(c) Definition of gross income from property.—For purposes of this section—

“(1) Gross income from the property.—The term 'gross income from the property' means, in the case of a property other than an oil or gas well, the gross income from mining.

“(2) Mining.—The term 'mining' includes not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products, and so much of the transportation of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto as is not in excess of 50 miles unless the Secretary or his delegate finds that the physical and other requirements are

such that the ore or mineral must be transported a greater distance to such plants or mills.

“(3) Extraction of the ores or minerals from the ground.—The term ‘extraction of the ores or minerals from the ground’ includes the extraction by mine owners or operators of ores or minerals from the waste or residue of prior mining. The preceding sentence shall not apply to any such extraction of the mineral or ore by a purchaser of such waste or residue or of the rights to extract ores or minerals therefrom.

“(4) Ordinary treatment processes.—The term ‘ordinary treatment processes’ includes the following:

“(A) In the case of coal—cleaning, breaking, sizing, dust allaying, treating to prevent freezing, and loading for shipment;

“(B) in the case of sulfur recovered by the Frasch process—pumping to vats, cooling, breaking, and loading for shipment;

“(C) in the case of iron ore, bauxite, ball and sagger clay, rock asphalt, and minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, and sintering to bring to shipping grade and form, and loading for shipment;

“(D) in the case of lead, zinc, copper, gold, silver, or fluorspar ores, potash, and ores which are not customarily sold in the form of the crude mineral product—crushing, grinding, and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation

(but not including as an ordinary treatment process electrolytic deposition, roasting, thermal or electric smelting, or refining), or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore, including the furnacing of quicksilver ores; and

“(E) the pulverization of talc, the burning of magnesite, and the sintering and nodulizing of phosphate rock.”

APPENDIX "B."

Table Showing Page References to Identification, Offer, Admission and Rejection of Exhibits

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APPELLANT MONOLITH'S REPLY BRIEF AND
ITS ANSWER AS CROSS-APPELLEE.

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APPELLANT MONOLITH'S REPLY BRIEF AND ITS ANSWER AS CROSS-APPELLEE.

I.

QUESTIONS PRESENTED.

Following appellee's¹ numerous admissions and abandonment of points on appeal in its brief, only two questions are presented to this Court:

A. Whether taxpayer's depletion deduction should be computed on the sales price of its cement, by virtue of

¹Although the appellee has filed a cross-appeal and is technically a cross-appellant, taxpayer will refer to it as "appellee" herein, or as the "Commissioner" whose acts are those complained of.

the clear and unambiguous statutory provisions in Section 114(b)(4)(B) of the Internal Revenue Code of 1939, laying down the simple, practical rule that “the term ‘mining’ as used herein shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products”, or whether it should be computed on a purely hypothetical value assigned to the limestone content of the finished cement by the Commissioner.

B. Whether taxpayer’s depletion deduction should be computed as 15% of the selling price of its finished cement, by virtue of the statutory provision in Section 114(b)(4)(A)(iii) of the Internal Revenue Code of 1939, applying such rate to “chemical grade limestone,” and taxpayer’s proof that such term means a limestone suitable for any industrial chemical application, or whether it should be computed as 10% of such sales price of its cement allowed “calcium carbonates” under Section 114(b)(4)(A)(ii), as a “miscellaneous” limestone usable for non-chemical purposes.

Since Question “A” above is the only question raised by appellee’s cross-appeal, it will be discussed first. Taxpayer will then reply to appellee’s answer to taxpayer’s presentation of Question “B” in its opening brief.

Other subsidiary questions, not essential to a decision, but of importance in insuring a proper compliance with this Court’s mandate will also be discussed in their proper context.

II.

THE DISTRICT COURT PROPERLY HELD THAT THE DEPLETION DEDUCTION FOR LIMESTONE SHOULD BE COMPUTED AS A PERCENTAGE OF THE INCOME REALIZED FROM THE FINISHED BULK CEMENT.

A. The Statute Expressly Provides That "Mining" Shall Include the Ordinary Treatment Processes Normally Applied by Miners in Order to Obtain the Commercially Marketable Mineral Product or Products.

Section 23(m) of the Internal Revenue Code of 1939 allows a deduction for depletion in the computation of net income. Section 23(n) provides that the basis for such depletion "shall be as provided in section 114."

Subparagraph (A) of Section 114(b)(4) provides that in the case of certain mines and other natural deposits, including deposits of limestone, the deduction allowed by Section 23(m) "shall be" a percentage of "gross income from the property" subject to a limitation that such deduction cannot exceed 50% of the net income from the property.

Subparagraph (B) of the same section defines "gross income from the property" to mean "gross income from mining" and then defines "mining" as follows:

"The term 'mining', as used herein, shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products . . ." (Italics added.)

This statutory language is clear and unambiguous. Its obvious meaning is that gross income from mining must include the income from *all* processes which are normally applied to the ore or mineral in order to obtain "the commercially marketable mineral product or products," that is, the products obtained for which a commercial market exists.

This language has been held to be "clear and unambiguous" by four Courts of Appeal.

United States v. Cherokee Brick & Tile Company,
218 F. 2d 424 (C. A. 5th, 1955);

Townsend v. The Hitchcock Corporation, 232 F.
2d 444 (C. A. 4th, 1956);

United States v. Sapulpa Brick & Tile Corporation,
239 F. 2d 694 (C. A. 10th, 1956);

Dragon Cement Company, Inc. v. United States,
244 F. 2d 513 (C. A. 1st, 1957), *cer. den.* 355
U. S. 833 (1957).

This "clear and unambiguous" principle was recently reaffirmed by the Fifth Circuit in *United States v. Merry Brothers Brick & Tile Company*, 242 F. 2d 708 (C. A. 5th, 1957) (and the Supreme Court again denied certiorari. 355 U. S. 824 (1957)), which approved the law stated in *Cherokee* that (p. 709):

"The statutory language is clear and unambiguous, which is that gross income from mining must include the income from ordinary treatment processes which must be applied to the ore or mineral in order to obtain the commercially marketable mineral product, that is, the first product which is marketable in commerce. There is no provision in the statute for excluding any process before such a marketable product is reached. The only restriction is that the processes must be the ordinary treatment processes normally applied by mine owners or operators."

B. Since There Is No Commercial Market for Monolith's Limestone Before It Is Processed Into Cement, Its Depletion Upon the Limestone Must Be Computed on the Selling Price of Its Cement.

The undisputed findings of fact are that there is no commercial market for Monolith's limestone before it is processed into cement [F. of F. X, R. 65], and that the first commercially marketable product is cement [F. of F. XI, R. 65].

The Government admits at page 11 of its Brief that:

"The question whether the taxpayer's first commercially marketable mineral product was Portland cement or some lesser product is no longer in issue."

The undisputed findings of fact are also that *all* of the processes applied by the taxpayer to produce its cement were usual and customary steps applied in the cement industry to obtain cement. [F. of F. III, R. 63.]

The Government stipulated that *all* the steps or processes applied by the taxpayer to obtain cement are the usual and ordinary steps applied in the cement industry to obtain cement [R. 24].

It follows from these undisputed facts that Monolith's depletion deduction is to be computed on the selling price of its cement, since all of the processes which it applied to its limestone to obtain cement were ordinary treatment processes normally applied by mine owners or operators to obtain the commercially marketable mineral product.

C. The Illustrative Enumeration of “Ordinary Treatment Processes” in Section 114(b)(4)(B) Does Not in Any Way Modify or Change the Scope of the “Mining” of Plaintiff’s Limestone.

The enumeration of certain processes as included in “ordinary treatment processes” in Section 114(b)(4)(B) do not modify or restrict the definition of “mining” as applied to plaintiff’s limestone.

The enumerated process steps are not exclusive and complete, since the statute merely states that ordinary treatment processes “*shall include*” those enumerated. The illustrations are non-exclusive. As Section 3797(b) of the Internal Revenue Code of 1939 provides:

“The terms ‘includes’ and ‘including’ when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined.”²

D. The Decision Below as to Computing the Percentage Depletion on the Commercially Marketable Product—Cement—Is Supported by All Courts of Appeal Decisions.

All Courts of Appeal which have considered the proper point at which to compute the percentage depletion deduction have held that the deduction was to be *computed on* the income from the “commercially marketable mineral

²See also: *Gray v. Powell*, 314 U. S. 402, 416 (1941); *Federal Land Bank of St. Paul v. Bismarck Lumber Company*, 314 U. S. 95, 99-100 (1941); *Dragon Cement Company v. United States*, 244 F. 2d 513, 516 (C. A. 1st, 1957); *Townsend v. The Hitchcock Corporation*, 232 F. 2d 444, 447 (C. A. 4th, 1956).

product” resulting from the application of “ordinary treatment processes.”

United States v. Cherokee Brick & Tile Co., 218 F. 2d 424 (C. A. 5th, 1955);

United States v. Merry Brothers Brick & Tile Company, 242 F. 2d 708 (C. A. 5th, 1957), cert. den., 355 U. S. 824 (1957);

Townsend v. Hitchcock Corporation, 232 F. 2d 444 (C. A. 4th, 1956);

United States v. Sapulpa Brick & Tile Corporation, 239 F. 2d 694 (C. A. 10, 1956);

Dragon Cement Co., Inc. v. United States, 244 F. 2d 513 (C. A. 1st, 1957), cert. den., 355 U. S. 833 (1957).

As the Court said in the *Townsend* case (232 F. 2d 444, 447):

“Congress clearly provided that the cost of obtaining a marketable product should come within the definition of mining and the same basis should be applied to gross sales. The only limitation by Congress is that the process must be that normally applied by the miner to obtain a marketable product. *It seems immaterial whether that process be one of manufacture as in the brick and tile case (supra) (United States v. Cherokee Brick and Tile Co., 5 Cir., 218 F. 2d 424), or some other step; that which was essential to obtain the first marketable products is an expense of mining and the gross sales of the products so mined is the gross income from which the 15% depletion is to be taken.’*” (Italics added.)

E. Congress Deliberately Adopted the “Commercially Marketable Product” as the Basis for Depletion to Provide a Simple, Practical Rule.

As a result of many disputes between the Commissioner and the mine owners over the percentage depletion deduction, Congress enacted, in Section 124(c) of the Revenue Act of 1943 (which became Sec. 114(b)(4)(B)), the statutory definition of “gross income from the property.”

In explaining the new provision, the Committee stated:

“The purpose of the provision is to make certain that the ordinary treatment processes which a mine operator would normally apply to obtain a marketable product should be considered as a part of the mining operation . . .

“The law has never contained such a definition, and its absence has given rise to numerous disputes. *The definition here prescribed expresses the congressional intent of these provisions as first included in the law. . . .*” (Sen. Rep. 627, 78th Cong., 1st Sess., pp. 23, 24, 1944 C. B. 991.) (Italics added.)

Nevertheless, the Treasury did not yield to the mandate of Congress. When the Revenue Act of 1951 added a number of new minerals to the list of those entitled to percentage depletion (including, for the first time, those used in the production of cement), the Treasury again attacked the commercially marketable mineral products rule. It wrote a “mining/manufacturing” theory into the regulations governing the computation of the allowance for certain of those minerals (including those used by the cement industry). This theory apparently represented the formalization of a point of view that had been basic to the Treasury’s thinking in its pre-1943 efforts

to frustrate the commercially marketable mineral products test.

Objection to the re-introduction of this Congressionally disapproved doctrine soon appeared. A rash of litigation broke out. The Treasury's regulation was challenged in the courts by taxpayers in several industries. They argued that the regulation was invalid, since it was in clear conflict with the commercially marketable mineral products test. The litigation was strongly resisted by the Government. It culminated in a complete victory for the taxpayers. The courts of appeals for four federal circuits, without a single dissent, unanimously agreed that the "mining/manufacturing" argument of the Treasury was not compatible with the "clear and unambiguous" meaning of the statute. The Treasury's regulation was held invalid. In October of 1957, the Supreme Court announced that it would not review the issue, thus leaving undisturbed the decisions of the courts of appeals.³

The commercially marketable product rule adopted by Congress was a logical one, in view of the purpose to be accomplished. Congress sought to end numerous disputes, caused by the Treasury's attempt to whittle away at the depletion deduction.⁴ Congress wanted a simple,

³*Dragon Cement Company, Inc. v. United States*, 244 F. 2d 513 (1st Cir., 1957), cert. den. 355 U. S. 833 (1957); *United States v. Merry Brothers Brick & Tile Company et al.*, 242 F. 2d 708 (5th Cir., 1957), cert. den. 355 U. S. 824 (1957); *United States v. Cherokee Brick & Tile Co.*, 218 F. 2d 424 (5th Cir., 1955); *United States v. Sapulpa Brick & Tile Corp.*, 239 F. 2d 694 (10th Cir., 1956); *Townsend v. The Hitchcock Corp.*, 232 F. 2d 444 (4th Cir., 1956).

⁴Taxpayer has appended to this brief, as Appendix "A", a concise legislative history of percentage depletion and the "gross income from mining" which led to the enactment of Section 114(b)(4)(B), and its easily applied definition of "mining" as including "ordinary treatment processes."

practical, definite rule. Certainly the rule adopted was the best one for that purpose, since the cut-off point was directed to the marketable product whose market price could be easily ascertained and used as a basis for computing the deduction. As the District Court pointed out in *Cherokee Brick & Tile Company v. United States*, 122 Fed. Supp. 59 (affd., 218 F. 2d 424), at pages 63-64:

“It is this Court’s opinion that the ‘first commercially marketable product test’ was used because at no earlier stage would it be possible to determine just what would be the gross income from mining. If it be determined that mining includes processes (a) through (h) how could this Court compute the gross income from such operations, where the product at that stage had no market? It is true that the Commissioner by regulations has provided that in such cases the income from each process shall be considered as proportionate to costs. This is obviously a pure fiction which might be false more often than true. Evidently, it was to obviate the necessity of using such a fiction that Congress adopted the ‘first commercially marketable product’ test to determine what acts constitute mining.”

Quite apart from the fact that gross income computed in this way “is obviously a pure fiction which might be false more often than true,” the actual problem of allocating income and costs in this way is extraordinarily difficult. Some items, such as the cost of certain labor and repair parts (*i.e.*, direct costs), are clearly attributable to a given operation. Indirect costs are another matter altogether. They cannot be determined with accuracy and present complex accounting problems of allocation on which responsible members of the accounting profession differ. The possibilities of differences between revenue agents and taxpayers are obvious.

In short, were the appellee's argument adopted, a Pandora's Box would be opened, leading to yet another round of litigation before the taxpayers got the benefits intended by Congress.

F. The Appellee Argues That Although the Process of Adding Small Quantities of Other Materials to the Limestone Essential to the Production of Cement Is Admittedly an "Ordinary Treatment Process," the Income "Attributable" to the Added Materials Should Be Excluded When Computing the Depletion at the Commercially Marketable Product Stage.

1. The Appellee's "Additives" Argument Is Based on the Fallacious Assumption That the Depletion Deduction Is Allowed on the Commercially Marketable Product, Whereas, Such Depletion Is Actually Only Computed on Such Product.

Having deliberately stipulated below that the addition of essential raw materials to limestone to obtain the admitted "first commercially marketable product"—bulk Portland cement—is an "ordinary treatment process" [R. 24] the appellee repudiates its stipulation, and by an involved, exercise in applied semantics, attempts to justify its conduct. It is not an easy task.

Passing the fatal objections that such point is both untimely and may not now be urged, and that the issue is one of fact decided adversely to appellee below, based on undisputed, stipulated facts (Rule 52, F. R. C. P.), the argument is contrary to the clear, unambiguous statute, contrary to judicial authority, and contrary to the record facts.

The basic argument on "additives" is not related to the plain command of the statute, but rests, rather, upon the

theory or concept of depletion which the Commissioner contends is reasonable. Basically, the argument is that since it is “unsound” to calculate depletion on a “commercially marketable product” which contains small quantities of other essential materials in addition to the limestone, the income attributable to such process step of adding such materials should be excluded from the depletion base, although it must and has been conceded that such process is an “ordinary treatment process.” (Br. pp. 11, 14, 17.)

The assumed rationale is that while the process which adds or “blends” such “additives” to the limestone in order to produce cement—“the commercially marketable product”—is an “ordinary treatment process,” the “additives” are not, and unless excluded, some sort of double depletion will result. (We will pass for the moment, the incorrect assumption that “blending” cement raw materials is a mere mixing which effects no chemical or physical change.) The appellee’s brief undertakes to confuse the issue by giving the impression that since the statute allows the depletion *for* the limestone, the percentage depletion must be calculated *on* the *limestone content* of the admittedly first “commercially marketable mineral product”—cement.

Nothing could be further from the truth. Percentage depletion is not allowed *on* any process, and is not allowed *on* any process step, *on* any product or *on* the contents thereof. On the contrary, depletion is allowed to compensate the mine owner *for* exhaustion of his natural deposit. Congress directed the deduction allowed for such exhaustion to be *computed* as a stated percentage of the selling price of the “commercially marketable product.” It has done so by defining “gross income from the prop-

erty” in Section 114(b)(4)(B) to include not only the income derived from the extraction process but also the income from processes applied to the ore or mineral, after extraction from the natural deposit, to obtain the commercially marketable product. But in no sense does this mean that depletion is allowed *on* any of the processes, or *on* the products or the contents thereof, or that such processes, or products are depleted.

Appellee requests this Court to rewrite the statute—to go behind the statutory cut-off point of “commercially marketable product” fixed by Congress. The argument is based, not on statutory construction, or even legislative history, but on what the Commissioner desires.

2. Appellee’s Argument Ignores the Obvious Fact That Congress Intended to Provide a Simple, Practical Rule Which Could Be Easily Applied to Compute the Percentage Depletion Deduction.

In order to compute a percentage depletion deduction, there must be a dollar base to which the applicable percentage must be applied. Congress elected to use the marketable product rule as a simple means to provide this dollar base. With this dollar base established in subparagraph (B) of Section 114(b)(4), Congress can then set the applicable rates in subparagraph (A) to produce the dollar amount of depletion which it wishes to grant in the case of each particular type of natural deposit without disturbing the simple means for determining the dollar base.

If Congress on further consideration should feel that applying the applicable rate to the gross income resulting from the sale of the commercially marketable product, produces too large a depletion deduction, or produces un-

desirable “double depletion,” it has only to lower the rate, while still using as a base the gross income from the marketable product.

In spite of its effort to conceal the fact, the Government’s argument essentially is merely that depletion calculated upon the marketable product is “unsound.” However, this is a matter exclusively for Congress.

Lewyt Corp. v. Commissioner, 349 U. S. 237, 99 L. Ed. 1029 (1955);

Helvering v. Wood, 309 U. S. 344, 347, 84 L. Ed. 796 (1940).

The Government, therefore, realizing that it cannot ask this Court to change the percentage rates specified in the statute, seeks instead to have this Court rewrite the statute by changing the dollar base to which the rate is applied, as it has unsuccessfully urged in a variety of arguments in other cases in the several Circuits.

The Government argues that as to the “additives” purchased by Monolith, other taxpayers who mined such materials “presumably have claimed the statutory depletion allowance and (they) cannot be depleted” by Monolith “who had no economic interest in their production.” (Br. p. 16.) It also argues that the “additives” mined by Monolith “If . . . depletable at all . . . are depletable at whatever percentage rates are provided as to each” and not as part of the depletion computed on the basis of Monolith’s admittedly first “commercially marketable mineral product”—bulk Portland cement. (Br. p. 16.)

Of course, Monolith is not claiming a depletion allowance on materials purchased from others, or on its own mined “additives” used in producing the first “commer-

cially marketable mineral product”—bulk Portland cement. Monolith is claiming a deduction for depletion only on its natural deposit of limestone. It is because the bulk Portland cement is the “commercially marketable mineral product” obtained from such limestone, that the statute requires that the selling price of the bulk cement be used as the basis for *measuring* the *allowance*. This in no way means that Monolith is taking a depletion allowance on its purchased additives or mined additives as such. The Government confuses the *allowance* of the deduction for depletion with the *statutory method for computing* it. Upon the slightest reflection, counsel could not fail to recognize that at whatever stage of processing “the commercially marketable product” is reached, processes involving depreciation and other costs involving tax allowances have been used in bringing it to that stage. Counsel must know not only that the statute requires, but that the Commissioner’s universal practice is to allow, depletion computed on the full value of the commercially marketable product, and also to allow as deductions from gross income the depreciation and other tax allowances involved in the costs of bringing the product to that stage. Nor can counsel be ignorant of the fact that in many other cases (litigated and settled) the Commissioner has allowed the inclusion of additives necessary to combine with the basic raw material (here limestone) to produce the first commercially marketable product. (*E.g.*, see *Northwest Magnesite Co. v. United States*, 58-1 U. S. T. C., par. 9394.)

In summary, Congress was not concerned with the refinements of semantics when it enacted Section 114(b) (4)(B). It was concerned only with whether a commercial market exists for a particular product to pro-

vide a convenient or starting point for *computing* the depletion deduction. Any cost and every cost necessarily incurred in bringing the basic raw material—limestone—to the commercially marketable product stage is includible.

The Government, by emphasizing the word “treatment” in “ordinary treatment processes,” seeks to narrow the depletion base to which the percentage rate is applied. (Br. pp. 10-19, specifically pp. 11-14, 17.)

The Government’s argument is strained and incorrect. First, as pointed out above, Congress was not concerned with such a technical distinction, and nothing in the legislative history indicates that “treatment” was to be given the meaning the Government urges. Rather, the record shows that *all ordinary* processes were included.

Second, the law is settled that

“ . . . in interpreting the meaning to be given words used in legislative enactments the words are to be given their known and ordinary signification. The obvious, plain and rational meaning is preferable to a narrow, strained, or hidden meaning.”

Old Colony R. Co. v. Commissioner, 284 U. S. 552, 560, 76 L. Ed. 484 (1932);

United States Gypsum Company v. United States, 253 F. 2d 738, 744 (C. A. 7th, 1958).

Finally, the ordinary meaning of the words “treatment processes” is not as the Government alleges. Webster’s New International Dictionary (2d Ed.) defines “Treatment” as: “1. Act, manner, or an instance of treating, esp. of treating a . . . , subject or a substance, as in processing; handling.” “Treat” is defined as “7. To subject to some action, as of a chemical reagent; as, to *treat* a substance with sulphuric acid; often, to subject (a na-

tural or manufactured article) to some process to improve its appearance, taste, usefulness, etc.; to process; . . .”

The Government's definition of “treatment” as limited or restricted to processes “applied directly to the mineral” (Br. p. 14) is clearly not correct. “Treatment” can be and usually is, much broader in ordinary language and includes any instance where the article is subjected to processing of any kind whether something is added or not.

3. The Decision Below Is Supported by All the Decided Cases.

The Government states that the “additives” issue is “one of first appellate impression.” (Br. p. 19.) The truth is, that the decided cases support taxpayer's position. It is true that in many of these cases the precise point in issue was what was the “commercially marketable product.” However, implicit in these cases was the accepted premise that the addition of “additives” was an “ordinary treatment process” and that income attributable thereto was properly included in “gross income from mining.” Having been soundly defeated on the “commercially marketable product” issue the Government has “doubled back,” reversed its field, and has now formulated a *new* argument, contrary to its record position in other cases.

The question of “additives” was present and necessarily decided favorably to taxpayer in all the brick and tile cases,⁵ where straw or other additives were added to

⁵*United States v. Cherokee Brick & Tile Company*, 218 F. 2d 424 (C. A. 5th, 1955); *United States v. Merry Brothers Brick & Tile Company*, 242 F. 2d 708 (C. A. 5th, 1957), *cert. den.* (1957), 355 U. S. 824; *United States v. Sapulpa Brick & Tile Corp.*, 239 F. 2d 694 (C. A. 10th, 1956). See also numerous District Court decisions, *e.g.*, *Ferris Brick Co. v. United States*, 56-1 U. S. T. C. Para. 9355 (N. D. Texas, 1956).

the raw mix to obtain the commercially marketable product. The Government conceded the propriety of including additives in such cases, whether expressly or impliedly is immaterial.

The question was also present and necessarily decided favorably to taxpayer in numerous other cases. (*E.g.*, *Northwest Magnesite Co. v. United States*, 58-1 U. S. T. C., Par. 9394 (E. D. Wash., 1958). The fact that the Government sought no allocation or exclusion of "additives" in such cases does not obscure the fact that "additives" were present, were found to be "ordinary treatment processes," and were included in "gross income from mining."

The question was expressly discussed in the opinion in *Sparta Ceramic Co. v. United States* (N. D. Ohio), decided Nov. 12, 1958 (58-2 U. S. T. C. Par. 9965) appeal pending (C. A. 6th). The Government's citation of and reliance on *Sparta* (Br. p. 18) is unfortunate, since the court there expressly rejected the Government's present argument as follows:

"The use of additives would appear to be an ordinary process applied to obtain a commercially marketable product. Although not all of the tile produced by plaintiff contained body additives, expert testimony was given that in those instances in which it was used it was necessary to do so to avoid undesirable scumming effects resulting from certain clay mixtures, and that this was a normal practice in the industry."

The Government misleadingly goes on to quote the decision's exclusion of other additives (glazing) *after* the

commercially marketable product was obtained. The court stated:

“ . . . glazing was not necessary to obtain a commercially marketable product and, *therefore*, is not a necessary treatment process.” (Italics added.)

“When it has been determined, as here, that the first commercially marketable product was secured, namely unglazed tile, this ends the matter and taxpayer may not include any *unnecessary* improvement costs in computing its depletion base.” (Italics added.)

Finally, the two Tenth Circuit cases relied on by Government (*United States v. Utco Products*, 257 F. 2d 65; *Commissioner v. American Gilsonite Co.*, 259 F. 2d 654) while turning on the question of “bagging,”⁶ contained language *quoted by the Government* (Br. p. 12) completely supporting the taxpayer.

In *United States v. Utco*, 257 F. 2d 65, 68 (C. A. 10th, 1958) the court stated:

“We are of the opinion that the phrase ‘ordinary treatment process,’ except where the statute otherwise provides, means a process of treating which separates the mineral from other minerals in which it is found or with which it is associated, *or which effects a chemical or physical change in the mineral itself* . . .” (Italics added.)

It is a fact, the record shows, and the Government stipulated that when the “additives” are blended with taxpayer’s limestone, and the resultant mixture is calcined in a rotary kiln “complex chemical reactions occur, which result in entirely new compounds” which differ from the

⁶The Government admits that the Trial Court correctly excluded bagging in this case. (Note 3, Brief p. 7.)

raw mix both chemically and physically. [R. 18; Ex. 23, pp. 11, 27-28; R. 129.]

Such reactions, such physical and chemical changes, and the very production of cement itself, could not occur without the blending of “additives” with the limestone, which the Government itself admits is an “ordinary treatment process.” (Br. p. 11.)

All four of the complex chemical compounds produced in taxpayer’s rotary kiln [R. 18] contained calcium, which was “separated” from the limestone and chemically recombined with the silica, alumina and iron contained in both the limestone and also, as a matter of convenience, in the supplemental additives of these minerals, when subjected to heat. In fact, taxpayer could have reduced the calcium carbonates in the limestone by sorting or quarrying, but it would be more expensive than adding clays containing the silica and alumina or readily available iron cinders. Fluorspar is a chemical reagent which speeds the process, and the addition of gypsum at the finish grind creates a chemical action so as to retard the set of the cement. Such a process is clearly a “treatment” of the limestone under any definition.

The Government also misleads this Court by citing the case of *Riverton Lime & Stone Co. v. Commissioner*, 28 T. C. 446, for there, too, the first commercially marketable product was the pure hydrated lime. Naturally, the processes of adding other materials to produce additional products were not includable, since such processes were not applied to produce the commercially marketable

product. So, too, the cited decisions in *Black Mountain Corp. v. Commissioner*, 21 T. C. 746, and *Iowa Limestone Co. v. Commissioner*, 28 T. C. 881, 883 (Br. p. 19), are likewise distinguishable since they were decided on the “commercially marketable product” issue.

G. Even if Appellee's Erroneous Theory Were Adopted in Toto, There Should Be No Change in the Amount of the Trial Court's Judgment, if the Proper Method of Computation Were Employed.

Appellee, in extenuation of its strained and erroneous construction of the statute regarding additives, attempts to show that a substantial dollar difference would result were “additives” excluded. (Br. pp. 6-7.) However, the reduction in the judgment referred to by appellee (Br. pp. 6-7) is based on a computaton of depletion which ignores appellee's concession that all the processing steps are to be included in the depletion base and which is, therefore, erroneous both in theory and application. Assuming that income were to be allocated to and excluded for additives under appellee's theory (a pure fiction which the *Cherokee* decision held could be as false as often as true), there are any number of methods for computing such exclusion. Some are reasonably compatible with appellee's position. Others, including the method claimed by appellee (Br. pp. 6-7), are not.

While vigorously denying that additives are excludable, taxpayer must demonstrate the extreme error of appellee's conclusions even if appellee's theory were adopted. This necessitates a consideration of the various methods

of computing depletion. For the purposes of this case, the many methods of computing depletion can be classified into five general groups:

1. Where all additives are included;
2. Where purchased additives only are excluded by deducting the actual costs of such additives from the depletion base income and expenses;
3. Where purchased additives only are excluded by allocating some arbitrary percentage of the depletion base income and expenses to such additives;
4. Where all additives are excluded by deducting the actual costs of such additives from the depletion base income and expenses; and
5. Where all additives are excluded by allocating some arbitrary percentage of the depletion base income and expenses to such additives.

A correct application of each of the various methods making arbitrary allocations for excluded additives will result in a correct mathematical conclusion, but the conclusion will not be compatible with the theories advanced and concessions made by appellee. Such inconsistencies become apparent upon review of the figures.

1. Computation of Depletion With No Exclusion for Additives.

The first method of computing is the one originally submitted by appellee to, and adopted by, the trial court in its Findings of Fact, Conclusions of Law and Judgment [R. 66-67] and is as follows:

Sales per return.....	\$8,702,101.20
Less: Royalties.....	<u>133,340.02</u>
	\$8,568,761.18
Less: Miscellaneous sales.....	<u>3,201.70</u>
Cement sales.....	<u>\$8,565,559.48</u>

Less:

1. Trade discounts	\$434,770.26
2. Trucking—contract and own fleet costs	815,483.36
3. Rail freight	212,558.53
4. Warehouse and bulk storage plant costs at distribution points	49,774.95
5. Additional charge for sales in bags	<u>389,350.00</u>

Total elimination from gross sales.....	<u>\$1,901,937.10</u>
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Gross income from mining.....	<u>\$6,663,622.38</u>
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Mining expenses.....	\$7,689,687.54
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Less:

1. Trade discounts	\$434,770.26
2. Trucking costs—contract and own fleet	815,483.36
3. Rail freight	212,558.53
4. Warehouse and bulk storage plant costs at distribution points	49,774.95
5. Costs of bags and bagging ex- penses	<u>771,119.85</u>

Total eliminations.....	<u>\$2,283,706.95</u>
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Allowable mining expense.....	<u>\$5,405,980.59</u>
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Net income from mining.....	<u><u>\$1,257,641.79</u></u>
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Depletion Allowable:

10% of gross income	<u>\$ 666,362.24</u>
15% of gross income	<u>999,543.36</u>

Limitation:

50% of net income	<u>\$ 628,820.89</u>
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Allowable depletion	<u><u>\$ 628,820.89</u></u>
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The \$628,820.89 “allowable depletion deduction” is the one which results in the trial court’s judgment for \$264,-435.41. [R. 67, 72.]

Since none of the other exclusions made in the trial court's computation are now in issue, and in order to simplify these illustrations, the "gross income from mining" and "allowable mining expense" figures determined in this first method will be used as the starting points in the subsequent computations.

2. **Computation of Depletion With Purchased Additives Excluded by Deduction of Actual Costs of Such Additives From Income and Expense.**

If any exclusions are to be made for additives, then appellant contends that the only proper method for computing such exclusions is the alternative proposal of appellee that the *actual costs* of the excluded additive materials should be deducted from both gross income and from mining expenses. The costs of the excluded additive materials will then be eliminated from the depletion base and also from the costs or expenses of the "ordinary treatment processes." Under this second method, a summary computation of depletion would be as follows:

Gross income from mining, per Findings of Fact (see above)		\$6,663,622.38
Less: Elimination for actual costs of purchased additives		
1. Costs of iron cinders	\$ 45,539.49	
2. Costs of fluorspar	3,278.44	
	<hr/>	
Elimination for additives		48,817.93
<i>Gross income from mining</i> (revised)		<hr/> \$6,614,804.45
Allowable mining expense per Findings of Fact (see above)		\$5,405,980.59
Less: Elimination for actual costs of purchased additives		
1. Costs of iron cinders	\$ 45,539.49	
2. Costs of fluorspar	3,278.44	
	<hr/>	
Elimination for additives		48,817.93
Allowable mining expense (revised)		<hr/> 5,357,162.66
<i>Net income from mining</i> (revised)		<hr/> <u>\$1,257,641.79</u>
Depletion allowable:		
10% of gross income	\$ 661,480.45	
	<hr/>	
15% of gross income	992,220.67	
	<hr/>	
<i>Limitation:</i>		
50% of net income	\$ 628,820.89	
	<hr/>	
<i>Allowable depletion</i>		<hr/> <u>\$ 628,820.89</u>

The above computation results in the same depletion allowance computed under the trial court's method involving no exclusion for additives. This means the judgment for \$264,435.41 would remain unchanged.

The above computation (and the computation under 4 below) thus complies with the alternative position set forth by appellee. (Br. pp. 11-12.) Inserting footnote 5 (p. 12) within the last sentence beginning on page 11 (and ending on p. 12) of appellee's brief, it would read:

"However, we strongly urge that . . ." the ". . . cost or fair market value of the raw material additives . . . should *not* be included in the depletion base."

The plain meaning of this position of appellee is that the actual costs (or fair market values) of the excluded additive materials should be deleted from the depletion base gross income and expenses determined by the trial court.

This position corresponds with appellee's position in another appellate court case involving an exclusion from the depletion base (*United States v. Utco Products, Inc.* (C. A. 10, 1958), 257 F. 2d 65 at 68), where precisely such method was employed to exclude the bagging process applied by the taxpayer *after* the "commercially marketable product" was obtained.

3. Computation of Depletion With Purchased Additives Excluded by Deduction of an Arbitrarily Allocated Percentage of Income and Expenses.

Under this method, the exclusion of additives is computed by arbitrarily *allocating* a percentage of the income and expenses to the excluded additive materials. The percentage deducted will vary, depending upon the factors to which the computer is attempting to relate the allocation. There appear to be at least three percentage methods in this case. One is based on the percentage the costs of the excluded additive materials bear to all mining expense, which percentage is used to reduce income and expense. Another is based on the percentage the costs of the excluded additive materials bear to the costs of all raw materials, which is used to reduce income and expense. The third is based on the percentage the tons of the excluded additive materials bear to the total tons of all raw materials, which is used to reduce income and expense. Appellant will consider all three.

a. *Allocation of Income on Basis of Percentage Actual Costs of Excluded Purchased Additive Materials Bear to All Mining Expenses.*

If any arbitrary percentage method of allocating income to excluded additives and computing depletion is at all reasonably compatible with appellee's position and concessions, it is this method where the deduction from expenses is on the basis of actual costs of the excluded materials and the allocation of income is based on the percentage those actual costs bear to all mining expenses.

Under this percentage method, a summary computation of depletion would be as follows:

Gross income from mining, per Findings of Fact (see above)		\$6,663,622.38
Less: Elimination for allocation to purchased additives (percentage actual costs of purchased additives bear to mining expense)		
1. Allocated to iron cinders	\$ 55,974.43 ⁷	
2. Allocated to fluorspar	4,064.81 ⁸	
Elimination for additives		60,039.24
<i>Gross income from mining (revised)</i>		<u>\$6,603,583.14</u>
Allowable mining expense per Findings of Fact (see above)	\$5,405,980.59	
Less: Elimination for actual costs of purchased additives		
1. Costs of iron cinders	\$ 45,539.49	
2. Costs of fluorspar	<u>3,278.44</u>	
Elimination for additives	<u>\$ 48,817.93</u>	
Allowable mining expense (revised)		<u>\$5,357,162.66</u>
<i>Net income from mining (revised)</i>		<u><u>\$1,246,420.48</u></u>
Depletion allowable:		
10% of gross income	<u>\$ 660,358.31</u>	
15% of gross income	<u>990,547.47</u>	
Limitation:		
50% of net income	<u>623,210.24</u>	
<i>Allowable depletion</i>		<u><u>\$ 623,210.24</u></u>

⁷ 55,974.43 = $45,539.49 \div 5,405,980.59 \times 6,663,622.38$

⁸ 4,064.81 = $3,278.44 \div 5,405,980.59 \times 6,663,622.38$

The above computation results in a depletion allowance of \$623,210.24 as compared with the allowance of \$628,820.89 determined by the trial court. This means the judgment for \$264,435.41 would be reduced to \$261,588.00, a difference of \$2,847.41.

The reasons for the assertion above that this method of computation is reasonably compatible with appellee's position and concessions are as follows:

Appellee admits the processing steps or acts applied in blending the raw materials, etc., are ordinary treatment processes, and takes the position that only the income attributable to the additive materials themselves, not the income attributable to the processing steps, should be eliminated. (Br. pp. 11-12.) The computation referred to by appellee (Br. pp. 6-7, 11) assumes no proof of the actual costs or fair market values of the additives exists and then allocates a percentage of both income and expenses to the excluded materials. However, it is unnecessary to make an allocation for expenses, or determine fictional expenses. The actual costs of the additive materials delivered at appellant's cement plant have been ascertained and are available.

With respect to income, the amount deducted for, or allocated to, the excluded additives should properly relate to only the materials themselves, and not the many processes that are applied in appellant's operation. Such an allocation can most accurately be done by deducting the costs or fair market values of the materials themselves, or, if any arbitrary percentage method is to be applied, then by ascertaining the relationship of those costs with the total expenses incurred in the whole operation, as in the last computation. To allocate any greater portion to income would constitute the allocation and exclusion of income attributable to the processing steps, which appellee admits are includable in the depletion base. (Br. p. 11.)

b. *Allocation of Income and Expenses on Basis of the Percentage the Actual Costs of the Excluded Purchased Additive Materials Bear to the Actual Costs of All Raw Materials.*

This method allocates income and expenses to the various materials in the same proportion as the costs of the materials bear to each other. A summary computation of depletion under this method follows:

Gross income from mining, per Findings of Fact (see above)		\$6,663,622.38
Less: Elimination for allocation to purchased additives (percent- age actual costs of purchased additives bear to actual costs of all materials used)		
1. Allocated to iron cinders	\$218,566.81 ⁹	
2. Allocated to fluorspar	<u>15,992.69¹⁰</u>	
Elimination for additives		234,559.50
Gross income from mining (revised)		\$6,429,062.88
Allowable mining expense, per Findings of Fact (see above)	\$5,405,980.59	
Less: Elimination for allocation to purchased additives (percent- age actual costs of purchased additives bear to actual costs of all materials used)		
1. Allocated to iron cinders	\$177,316.16 ¹¹	
2. Allocated to fluorspar	<u>12,974.35¹²</u>	
Elimination for additives		<u>190,290.51</u>
Allowable mining expense (revised)		5,215,690.08
Net income from mining (revised)		<u><u>\$1,213,372.80</u></u>
Depletion allowable:		
10% of gross income	642,906.29	
15% of gross income	<u>964,359.43</u>	
Limitation:		
50% of net income	<u>606,686.40</u>	
Allowable depletion		<u><u>\$ 606,686.40</u></u>

⁹45,539.49 ÷ 1,391,412.37 × 6,663,622.38 = 218,566.81

¹⁰ 3,278.44 ÷ 1,391,412.37 × 6,663,622.38 = 15,992.69

¹¹45,539.49 ÷ 1,391,412.37 × 5,405,980.59 = 177,316.16

¹² 3,278.44 ÷ 1,391,412.37 × 5,405,980.59 = 12,974.35

The above computation results in a depletion allowance of \$606,686.40 as compared with the allowance of \$628,820.89 determined by the trial court. This means the judgment for \$264,435.41 would be reduced to \$253,202.16, a difference of \$11,233.25.

The fiction involved in any of these methods arbitrarily allocating income or expense can be illustrated in the last computation. Since the allocation is based on the proportionate costs of the various raw materials, the high unit cost materials will be allocated a greater relative share of income and expenses. For example, fluorspar is a very high unit cost material. The amount of expenses allocated to it in the above computation is \$12,974.35, *four times its actual cost* shown in method 2 above.

The major defect in this method is that it is obviously allocating and excluding income and expenses which are attributable to the admittedly includable processing steps.

c. *Allocation of Income and Expenses on Basis of the Percentage the Tons of Excluded Purchased Additive Materials Bear to the Tons of All Raw Materials Used.*

Here, income and expenses are allocated to the various materials in the same proportion as the tonnages used of the materials bear to each other. A summary computation of depletion under this method follows:

Gross income from mining, per Findings of Fact (see above)		\$6,663,622.38
Less: Elimination for allocation to purchased additives (percent- age tons purchased additives bear to all materials used)		
1. Allocated to iron cinders	\$ 54,308.52 ¹³	
2. Allocated to fluorspar	<u>733.00¹⁴</u>	
Elimination for additives		\$ 55,041.52
<i>Gross income from mining</i> (revised)		<u>\$6,608,580.86</u>
Allowable mining expense, per Findings of Fact (see above)	\$5,405,980.59	
Less: Elimination for allocation to purchased additives (percent- age tons purchased additives bear to all materials used)		
1. Allocated to iron cinders	\$ 44,058.74 ¹⁵	
2. Allocated to fluorspar	<u>594.66¹⁶</u>	
Elimination for additives		<u>\$ 44,653.40</u>
Allowable mining expense (revised)		\$5,361,327.19
<i>Net income from mining</i> (revised)		<u><u>\$1,247,253.67</u></u>
Depletion allowable:		
10% of gross income	\$ 660,858.09	
15% of gross income	<u>991,287.13</u>	
<i>Limitation:</i> 50% of net income	<u>\$ 623,626.83</u>	
<i>Allowable depletion</i>		<u><u>\$ 623,626.83</u></u>

$$^{13} 563 \div 928,292 \times 6,663,622.38 = 54,308.52$$

$$^{14} 98 \div 928,292 \times 6,663,622.38 = 733.00$$

$$^{15} 563 \div 928,292 \times 5,405,980.59 = 44,058.74$$

$$^{16} 98 \div 928,292 \times 5,405,980.59 = 594.66$$

The above computation results in a depletion allowance of \$623,626.83 as compared to the allowance of \$628,820.89 determined by the trial court. This means the judgment of \$264,435.41 would be reduced to \$261,799.42, a difference of \$2,635.99.

Again, the fiction involved in arbitrarily allocating income and expense is illustrated. The expenses allocated to iron cinders and fluorspar in the above computation are less than the actual costs of those two materials (shown in method 2 above). This is especially true in the case of fluorspar. The reason for this difference is that fluorspar has a high unit cost.

The method last computed is, in principle, the same method used in Exhibit 29 of the record. The difference between the results of \$261,799.42 (computed above) and \$261,523.48 [Ex. 29, showing a refund of \$260,773.20, plus assessed interest of \$750.28] is due, basically, to the fact that in Exhibit 29, no allowance is made for the other exclusions determined by the trial court. It should be noted that Exhibit 29 was not prepared because appellant considered it the correct method of computing allowable depletion, *e.g.*, the exclusion of purchased additives. It was prepared in connection with settlement arrangements appellant thought it had concluded with appellee, and represented a compromise to effect speedy settlement (which never materialized).

To this point, appellant has submitted the calculations that are material to appellee's claim of possible double depletion, and the greatest possible reduction (under even most unreasonable methods) is \$11,233.25. All other additives were mined by appellant, concededly, as part of the ordinary treatment processes applied by appellant in producing the "commercially marketable product."

4. Computation of Depletion With All Additives Excluded by Deduction of Actual Costs of All Additives From Income and Expense.

This method is the same as method 2 above except that here all the additives are excluded. A summary computation of depletion under this method follows:

Gross income from mining, per Findings of Fact (see above)		\$6,663,622.38
Less: Elimination for actual costs of all additives		
1. Costs of iron cinders	\$ 45,539.49	
2. Costs of fluorspar	3,278.44	
3. Costs of clay #1	13,067.08	
4. Costs of clay #2	5,635.20	
5. Costs of tufa	30,232.21	
6. Costs of gypsum	152,489.72	
	<hr/>	
Elimination for additives		\$ 250,242.14
Gross income from mining (revised)		<hr/> \$6,413,380.24
Allowable mining expense, per Findings of Fact (see above)	\$5,405,980.59	
Less: Elimination for actual costs of all additives		
1. Costs of iron cinders	\$ 45,539.49	
2. Costs of fluorspar	3,278.44	
3. Costs of clay #1	13,067.08	
4. Costs of clay #2	5,635.20	
5. Costs of tufa	30,232.21	
6. Costs of gypsum	152,489.72	
	<hr/>	
Elimination for additives		\$ 250,242.14
Allowable mining expense (revised)		<hr/> \$5,155,738.45
Net income from mining (revised)		<hr/> <hr/> \$1,257,641.79
Depletion allowable:		
10% of gross income	\$ 641,338.02	
15% of gross income	\$ 962,007.04	
	<hr/>	
Limitation:		
50% of net income	\$ 628,820.89	
	<hr/>	
Allowable depletion		<hr/> <hr/> \$ 628,820.89

As in the computations under methods 1 and 2 above, the resulting depletion allowance is \$628,820.89. This means the judgment for \$264,435.41 would remain unchanged.

And, as stated under 2 above, the above computation complies with appellee's alternative position (Br. pp. 11-12), and corresponds with appellee's position in the Tenth Court of Appeals' case of *United States v. Utco Products, Inc.*

It is appellant's contention that if appellee's theory is adopted *in toto*, then the allowable depletion deduction should be determined in accordance with the last above computation.

5. Computation of Depletion With All Additives Excluded by the Deduction of an Arbitrarily Allocated Percentage of Income and Expenses.

As in 3 above, there are three methods of allocating income and expenses on a percentage method. The three variations will be considered separately as to their application to the exclusion of all additives.

a. *Allocation of Income on Basis of Percentage the Actual Costs of Excluded Additive Materials Bear to All Mining Expenses.*

It is this method (comparable to 3a) of arbitrarily allocating fictional income which appellant contends is most compatible with the position and concessions of appellee.

A summary computation of depletion under this method follows:

Gross income from mining, per Findings of Fact (see above)		\$6,663,622.38
Less: Elimination for allocation to additives (percentage actual costs bear to mining expense)		
1. Allocated to iron cinders	\$ 55,974.43 ¹⁷	
2. Allocated to fluorspar	4,064.81 ¹⁸	
3. Allocated to clay #1	15,992.69 ¹⁹	
4. Allocated to clay #2	6,930.17 ²⁰	
5. Allocated to tufa	37,316.29 ²¹	
6. Allocated to gypsum	187,914.15 ²²	
	<hr/>	
Elimination for additives		\$ 308,192.54
Gross income from mining (revised)		<hr/> \$6,355,429.84
Allowable mining expense, per Findings of Fact (see above)		\$5,405,980.59
Less: Elimination for actual costs of additives		
1. Costs of iron cinders	\$ 45,539.49	
2. Costs of fluorspar	3,278.44	
3. Costs of clay #1	13,067.08	
4. Costs of clay #2	5,635.20	
5. Costs of tufa	30,232.21	
6. Costs of gypsum	152,489.72	
	<hr/>	
Elimination for additives		\$ 250,242.14
Allowable mining expense (revised)		<hr/> \$5,155,738.45
Net income from mining (revised)		<hr/> <hr/> \$1,199,691.38
Depletion allowable:		
10% of gross income		\$ 635,542.98
15% of gross income		<hr/> \$ 953,313.48
Limitation:		
50% of net income		<hr/> \$ 599,845.69
Allowable depletion		<hr/> <hr/> \$ 599,845.69

$$^{17} 45,539.49 \div 5,405,980.59 \times 6,663,622.38 = 55,974.43$$

$$^{18} 3,278.44 \div 5,405,980.59 \times 6,663,622.38 = 4,064.81$$

$$^{19} 13,067.08 \div 5,405,980.59 \times 6,663,622.38 = 15,992.69$$

$$^{20} 5,635.20 \div 5,405,980.59 \times 6,663,622.38 = 6,930.17$$

$$^{21} 30,232.21 \div 5,405,980.59 \times 6,663,622.38 = 37,316.29$$

$$^{22} 152,489.72 \div 5,405,980.59 \times 6,663,622.38 = 187,914.15$$

The above computation results in a depletion allowance of \$599,845.69 as compared with the allowance of \$628,820.89 determined by the trial court. The judgment would be reduced from \$264,435.41 to \$249,730.50, or a difference of \$14,704.91.

The justification for this method is discussed in 2 above. Primarily, it is (1) that the deduction from expenses is for the *actual costs* only, and (2) the allocation of income, being in the same proportion as the deducted actual additive costs bear to total mining expenses, is more likely to relate to only the additive materials themselves, rather than the many processing steps which are not to be excluded (Br. p. 11).

- b. *Allocation of Income and Expenses on the Basis of the Percentage the Actual Costs of the Excluded Additive Materials Bear to the Actual Costs of All Raw Materials.*

This method is similar to method 3b. above except that it is applied to the exclusion of all additives. It involves the allocation of fictional income and expenses in the proportion the actual costs of the additive materials bear to the actual costs of all materials. The computation of depletion thereunder is as follows:

Gross income from mining, per Findings of Fact (see above)	\$6,663,622.38
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Less: Elimination for allocation
to additives (percentage actual
costs of additives bear to actual
costs of all materials used)

1. Allocated to iron cinders	\$218,566.81 ²³
2. Allocated to fluorspar	15,992.69 ²⁴
3. Allocated to clay #1	62,638.05 ²⁵
4. Allocated to clay #2	26,987.67 ²⁶
5. Allocated to tufa	144,600.61 ²⁷
6. Allocated to gypsum	<u>730,333.01²⁸</u>

Elimination for additives	\$1,199,118.84
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Gross income from mining (revised)	<u>\$5,464,503.54</u>
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Allowable mining expense,
per Findings of Fact
(see above)

\$5,405,980.59

Less: Elimination for allocation
to additives (percentage actual
costs of additives bear to actual
costs of all materials used)

1. Allocated to iron cinders	\$177,316.16 ²⁹
2. Allocated to fluorspar	12,974.35 ³⁰
3. Allocated to clay #1	50,816.22 ³¹
4. Allocated to clay #2	21,894.22 ³²
5. Allocated to tufa	117,309.78 ³³
6. Allocated to gypsum	<u>592,495.47³⁴</u>

Elimination for additives	<u>\$ 972,806.20</u>
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Allowable mining expense (revised)	<u>\$4,433,174.39</u>
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Net income from mining (revised)	<u><u>\$1,031,329.15</u></u>
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Depletion allowable:

10% of gross income	<u>\$ 546,450.35</u>
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15% of gross income	<u>\$ 819,675.53</u>
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Limitation:

50% of net income	<u>\$ 515,664.57</u>
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Allowable depletion	<u><u>\$ 515,664.57</u></u>
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$$^{23} 45,539.49 \div 1,391,412.37 \times 6,663,622.38 = 218,566.81$$

$$^{24} 3,278.44 \div 1,391,412.37 \times 6,663,622.38 = 15,992.69$$

$$^{25} 13,067.08 \div 1,391,412.37 \times 6,663,622.38 = 62,638.05$$

$$^{26} 5,635.20 \div 1,391,412.37 \times 6,663,622.38 = 26,987.67$$

$$^{27} 30,232.21 \div 1,391,412.37 \times 6,663,622.38 = 144,600.61$$

$$^{28} 152,489.72 \div 1,391,412.37 \times 6,663,622.38 = 730,333.01$$

$$^{29} 45,539.49 \div 1,391,412.37 \times 5,405,980.59 = 177,316.16$$

$$^{30} 3,278.49 \div 1,391,412.37 \times 5,405,980.59 = 12,974.35$$

$$^{31} 13,067.08 \div 1,391,412.37 \times 5,405,980.59 = 50,816.22$$

$$^{32} 5,635.20 \div 1,391,412.37 \times 5,405,980.59 = 21,894.22$$

$$^{33} 30,232.21 \div 1,391,412.37 \times 5,405,980.59 = 117,309.78$$

$$^{34} 152,489.22 \div 1,391,412.37 \times 5,405,980.59 = 592,495.47$$

The computation results in a depletion allowance of \$515,664.57 as compared to the depletion allowance of \$628,820.89 determined by the trial court. The judgment would then be reduced from \$264,435.41 to \$207,008.58, or a difference of \$57,426.83.

As discussed under 3b. above, the fictional character of the allocations made under this method are quite apparent. The allocation relates to the cost or value of the material involved and, of necessity, involves the allocation of income and expenses attributable to all the many processing operations. Gypsum, although used in quantities less than the clays, is allocated much greater shares of the allocated income and expense under this method because of its high unit cost. Actually, it would appear that proportionately less income and/or expense should be allocated to gypsum because gypsum is introduced at the very end of the processing operations, after the blending, grinding and burning of the other materials [R. 24].

c. *Allocation of Income and Expenses on Basis of the Percentage the Tons of Additive Materials Used Bear to the Total Tons of All Raw Materials Used.*

Here, we have the method set forth in 3c. above applied to the exclusion of all additives. The allocation of income and expenses is proportionate to the tons of the materials used. A summary computation thereunder follows:

Gross income from mining, per Findings of Fact (see above)	\$6,663,622.38
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Less: Elimination for allocation
to additives (percentage tons
additives bear to tons all mate-
rials used)

1. Allocated to iron cinders	\$ 54,308.52 ³⁵
2. Allocated to fluorspar	733.00 ³⁶
3. Allocated to clay #1	682,354.93 ³⁷
4. Allocated to clay #2	155,262.40 ³⁸
5. Allocated to tufa	65,969.86 ³⁹
6. Allocated to gypsum	<u>167,923.28⁴⁰</u>

Elimination for additives	<u>1,126,551.99</u>
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Gross income from mining (revised)	<u>\$5,537,070.39</u>
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Allowable mining expenses,
per Findings of Fact
(see above)

\$5,405,980.59

Less: Elimination for allocation
to additives (percentage tons ad-
ditives bear to tons all materials
used)

1. Allocated to iron cinders	\$ 44,058.74 ⁴¹
2. Allocated to fluorspar	594.66 ⁴²
3. Allocated to clay #1	553,572.41 ⁴³
4. Allocated to clay #2	125,959.35 ⁴⁴
5. Allocated to tufa	53,519.21 ⁴⁵
6. Allocated to gypsum	<u>136,230.71⁴⁶</u>

Elimination for additives	<u>913,935.08</u>
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Allowable mining expense (revised)	<u>\$4,492,045.51</u>
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Net income from mining (revised)	<u><u>\$1,045,024.88</u></u>
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Depletion allowable:

10% of gross income	<u>\$ 553,707.04</u>
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15% of gross income	<u>830,560.56</u>
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Limitation:

50% of net income	<u>522,512.44</u>
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Allowable depletion	<u><u>\$ 522,512.44</u></u>
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³⁵ 7,563 ÷ 928,292 × 6,663,622.38 =	54,308.52
³⁶ 98 ÷ 928,292 × 6,663,622.38 =	733.00
³⁷ 95,102 ÷ 928,292 × 6,663,622.38 =	682,354.93
³⁸ 21,659 ÷ 928,292 × 6,663,622.38 =	155,262.40
³⁹ 9,223 ÷ 928,292 × 6,663,622.38 =	65,969.86
⁴⁰ 23,393 ÷ 928,292 × 6,663,622.38 =	167,923.28
⁴¹ 7,563 ÷ 928,292 × 5,405,980.59 =	44,058.74
⁴² 98 ÷ 928,292 × 5,405,980.59 =	594.66
⁴³ 95,102 ÷ 928,292 × 5,405,980.59 =	553,572.41
⁴⁴ 21,659 ÷ 928,292 × 5,405,980.59 =	125,959.35
⁴⁵ 9,223 ÷ 928,292 × 5,405,980.59 =	53,519.21
⁴⁶ 23,393 ÷ 928,292 × 5,405,980.59 =	136,230.71

The above method results in a depletion allowance of \$522,512.44 as compared to the allowance of \$628,820.89 determined by the trial court. This would mean a reduction in the judgment from \$264,435.41 to \$210,483.87, or a difference of \$53,951.54.

This computation is, in principle, the same as the computation referred to by appellee (Br. pp. 6-7, 11). The difference between the \$210,483.87 and the \$209,950.86 referred to by appellee arises out of appellee's failure to make allowances for the other exclusions determined by the trial court. In effect, appellee's computation allocates some income and expenses twice.

Regardless of how appellee actually computed its allocations, appellant contends that any method of computation which *arbitrarily allocates* a certain percentage of income and expense as being attributable (a mere fiction) to additives is fallacious, unfair, and contrary to the clear and simple method of computing mineral depletion established by Congress.

It should be noted that in none of these computations is a depletion allowance made for taxpayer's *mined* additives, which appellee concedes are entitled to separate appropriate depletion allowances (Br. p. 16) if appellee's theory of excluding additives is adopted.

Finally, appellant reiterates that under the clear Congressional mandate, *all* additives are includable. The foregoing computations are presented merely to demonstrate the error of appellee's assertions as to the amount involved if additives are excluded, and incidentally, to highlight the controversies over the proper method of computation which Congress avoided by adopting the simple "commercially marketable product" rule.

III.

APPELLEE HAS BEEN GUILTY OF BAD FAITH
THROUGHOUT THIS CASE.

It is difficult to conceive what makes the attorneys representing the Internal Revenue Service deviate from the code of ethics usually followed and respected in connection with judicial proceedings.

The only logical explanation seems to be that the Internal Revenue Service has decided that it is to its interest to ride roughshod over the courts, counsel and parties under the cloak of its believed sovereign rights. The income tax is the greatest single cost item of all business including manufacturing. The Internal Revenue Service is also the most onerous creditor with its ability to arbitrarily levy upon private property. In this context, Revenue's refusal to meet minimum standards of accepted conduct in judicial proceedings is most alarming.

Appellant believes that the Internal Revenue Service would benefit by being compelled to recognize the existing law applicable to actions by or against the Government, which is that the Commissioner is bound by the conduct, concessions and admissions of his counsel, just as counsel for any other litigant.

As stated by the court in *Lenox Clothes Shops v. Commissioner*, 139 F. 2d 56, 59 (C. C. A. 6th, 1943):

"We gather from the record that respondent (Commissioner) was represented by able counsel and under such circumstances respondent (Commissioner) is required to observe the admissions and stipulations of counsel of record during the trial of a case, just as counsel for any other litigant."

See also:

United States v. Stinson, 197 U. S. 200, 205, 49 L. Ed. 724 (1905);

Commissioner v. Erie Forge Co., 167 F. 2d 71, 75 (C. C. A. 3d, 1948).

Believing that justice and the expeditious administration of the tax laws will be served thereby, appellant makes bold to delineate the many proofs of this sort of conduct in this case by many counsel.

Although a certain amount of misunderstanding is bound to occur in every case, and although in their role as advocates counsel may well reach for extreme positions, taxpayer believes that the present record conclusively demonstrates the bad faith of appellee. Since continuing litigation appears to be the only way taxpayer can obtain its legal rights at a substantial cost in time and money, taxpayer feels obligated to collate the cumulative evidence of such bad faith at this time. Possibly this record may obviate such flagrant double-dealing in the future, if responsible persons are advised of the character and extent of the conduct complained of.

A. The Negotiated Settlement Below Which Appellee Dishonored.

On December 20, 1957, Monolith offered to settle on the basis that the costs "attributable to iron cinders, fluorspar and bags and bagging be excluded." [R. 44.]

On January 2, 1958, as an inducement to Monolith's agreeing to a further continuance, the Government, by Charles K. Rice (Assistant Attorney General, Tax Division), accepted Monolith's offer, advising that the District Director had been directed to recompute the tax on the proposed basis. [R. 44.]

On January 9, 1958, Monolith replied:

“ . . . This basis is satisfactory to Monolith. In addition we will continue our joint effort to conclude both the Monolith and Monolith Portland Midwest Company tax refund matters for the years 1951 to and including 1954. . . .” [R. 44-45.]

Thereafter, appellee refused to honor this settlement.

B. Having Stipulated to Well Established Facts as to Taxpayer's Operation and Industry Practices, When Faced With Requests for Admissions and Discovery, Appellee Now Seeks to Repudiate Such Stipulation.

When the case was first filed, many complex, involved facts necessary to taxpayer's proof of its operation and industry practices were well-known to appellee by reason of its audits, field inspections of taxpayer's quarry and plant, etc. Taxpayer served Requests for Admissions and Interrogatories. [Clk. Tr. pp. 89, 336, 373.] Faced with the penalty provisions of the Federal Rules for refusing discovery in bad faith, appellee finally agreed to stipulate to the basic facts.

The appellee stipulated that those steps or processes applied by appellant where the other materials are blended with limestone are includible in determining gross income from mining as follows [Stip. of Facts No. 1, par. VIII, H; R. 21, 22].

“The parties to this action agree that the extraction and processing operations set forth below for the mining of the calcium carbonate rock generally known as ‘limestone’ are includable in determining gross income from mining under section 114(b) of the Internal Revenue Code of 1939, as amended, and were employed by plaintiff at its quarry and cement

plant at Monolith, California, during the year 1951 in order to obtain various types of Portland cement.

* * * * *

“H. The limestone from its hopper is then blended with clay #1 from another hopper, with clay #2 from another hopper and with iron cinders from another hopper by measuring and conveying equipment.”

The Government also stipulated that the addition of gypsum at the finish grind stage was included in the ordinary treatment processes normally applied in the cement industry. [Stip. of Facts No. 1, pars. IX, B and X; R. 23, 24.]

In addition, the parties to this action stipulated to the minute physical and chemical details concerning the additive materials [Stip. of Facts No. 1, pars. V-VII; R. 18-21]; and that all steps or processes applied by appellant in order to obtain finished cement are the usual and customary process steps applied in the cement industry to obtain finished cement. [Stip. of Facts No. 1, par. X; R. 24.]

As shown by its Brief (pp. 10-19, specifically p. 17), appellee now seeks to “wiggle out” of its stipulation deliberately made below by experienced tax counsel. In fact appellee brazenly contends that “There is no provision in the stipulation that the cost of additional materials or the income attributable to them should be included in the computation.” On this record, such contention is absolutely without foundation. The language used is accurate and precise.

C. The Appellee's Conduct During Trial When Presenting Findings of Fact.

At the close of testimony on March 21, 1958, Judge Mathes ruled that all additives were includable as a part of gross income from mining, and directed further argument on the "chemical grade limestone" issue only.

Thereafter, on March 24, 1958, following argument solely directed to the "chemical grade limestone" issue, previously characterized by the Court as the only remaining issue in the case, the Court announced its decision as follows [March 24, 1958, Rep. Tr. p. 180]:

"The Court: This isn't an easy question for me, but I shall rule that it's 10 per cent.

And there is nothing further to rule on, is there, in this case? Haven't I ruled on everything else?

Mr. Enright: I believe so.

The Court: Can't you prepare findings of fact, conclusions of law and judgment based on the rulings that have been made?

Mr. Enright: Yes, your Honor.

The Court: Very well. I will ask you to do so and settle them under Local Rule 7."

Pursuant to the Court's direction, appellant lodged with the Court and furnished to appellee complete Findings of Fact, Conclusions of Law and Judgment on March 25, 1958. There was no exclusion for additives in appellant's Findings of Fact and Conclusions of Law. Thereafter, on March 27, 1958, the appellee appeared and asked for more time to consider objections to appellant's Findings of Fact and Conclusions of Law and to prepare its own Proposed Findings of Fact and Conclusions of Law, but did not ask

for the exclusion of any additives at that time. On April 4, 1958, appellee lodged with the Court and furnished to appellant its Proposed Findings of Fact, Conclusions of Law and Judgment which did not exclude any additives. Thereafter, on April 9, 1958, the appellee filed its Proposed Amendments to Proposed Findings of Fact and Conclusions of Law. Such amendment *for the first time* proposed that additives should be excluded from gross income and expense, presumably on the appellee's theory presented in its brief.

In view of the 18 months of proceedings during which appellee's counsel made numerous stipulations and statements defining the issues, Judge Mathes took a very dim view of the timeliness and merit of the proposed amendment. [Rep. Tr. of April 14, 1958, p. 3, line 6.]

"The Court: You received some additional instructions from Washington, I take it, Mr. Messer?

Mr. Messer: Yes, your Honor.

The Court: Well, they are a little late and they're a little unmeritorious, shall I say."

Judge Mathes, of course, was familiar with the stipulation of facts, having based his decision in part thereon.

Thereafter, the following colloquy occurred [Rep. Tr. pp. 5, 6]:

"The Court: Mr. Messer, have you read what the plaintiff filed this morning?

Mr. Messer: I just received it as I walked into the court room.

The Court: You will blush when you read it, because it certainly does put the government in a very undignified light in this case. I have taken it good-humoredly up to now, but we have reached the limit.

Mr. Messer: Well, your Honor, from the transcript—

The Court: You have heard the phrase ‘trifling with the court,’ haven’t you?

The Government’s conduct in this case borders very much on ‘trifling with the court.’

Mr. Messer: Now, your Honor, I don’t want to be accused of trifling with the court—

The Court: I am not accusing you, because I don’t think you have anything to do with it.”

The Court denied appellee’s motion to amend [R. 61], and, after certain changes by interlineation, concerning what is chemical grade limestone, announced that it would approve the Findings of Fact and Conclusions of Law furnished by the appellee on April 4, 1958.

D. Appellee, Having Stipulated to Exclude Bags and Bagging Below, Designated the Court’s Decision in Accordance Therewith as Error.

Appellee agreed below that bags and bagging should be excluded in this case. [R. 99-100, 113.]

On its cross-appeal, appellee designated the court’s decision in excluding bags as error. [R. 148-149, incorporating designation filed in District Court.]

Despite the fact that the point was clearly without merit and a reversal of trial court agreed procedure, taxpayer was required to, and did expend substantial time and effort in preparing the bagging issue on this appeal.

In its Brief, appellee abandons the bagging issue (p. 7) stating that it was “designated as error for protective purposes only.”

E. Appellee's Conduct Before This Court Is Subject to Censure.

Passing the many instances of appellee's misleading and inaccurate "short-quotes" and similar borderline conduct, taxpayer refers the court to page 17 of appellee's Brief.

Appellee states:

"Indeed, . . . At one point taxpayer expressed a willingness to concede the issue as to the purchase(d) additives [R. 111] . . ."

When the cited record is read, the truth appears. Taxpayer then *offered to compromise* the additives issue to settle the *whole* case. [R. 111.] The method of computation *included* the mined additives and *excluded* the purchased additives. Such offer was made in the belief that the basic agreement for settlement discussed in "A" above had been reached. Appellee now implies that such "willingness" represented a vacillation in theory by taxpayer. Again the record is twisted, and appellee seeks to use an offer of compromise as *evidence* of a fact—a careless disregard of elementary principles of evidence as well as ethics.

IV.

TAXPAYER HAS ESTABLISHED THAT THE ONLY REASONABLE INTERPRETATION OF "CHEMICAL GRADE LIMESTONE" IS LIMESTONE SUITABLE FOR USE IN AN INDUSTRIAL CHEMICAL PROCESS SUCH AS CEMENT, AND THAT ITS LIMESTONE IS SUBJECT TO THE 15% RATE OF DEPLETION.

As fully discussed in its opening brief, taxpayer established the following decisive undisputed facts:

1. Congress directed that "chemical grade limestone" be given its commonly understood commercial meaning (Op. Br. p. 19);
2. "Chemical grade limestone" had no commonly understood commercial meaning (Op. Br. pp. 20-21);
3. The cement industry was a chemical process industry (Op. Br. pp. 17-18);
4. The only reasonable interpretation of the Congressionally coined phrase was any limestone suitable for an industrial chemical use (Op. Br. pp. 20-26);
5. Taxpayer's limestone in question was suitable for and used in an industrial chemical process. [R. 18.]

On this clear record, taxpayer's limestone is entitled to depletion at the rate of 15% as provided in Section 114 (b)(4)(A)(iii) of the Internal Revenue Code of 1939, and the Court erred in holding the contrary.

A. Appellee Does Not Challenge Taxpayer's Documented Proof That the Cement Industry Is a "Chemical Industry."

In its opening brief, taxpayer established that the cement industry is a chemical process industry, as are the glass, alkali, lime, paper, etc. industries, as to which appellee has

allowed a 15% rate under Section 114(b)(4)(A)(iii) for the limestone used therein. (Br. pp. 12, 17-19, 28-29.)

Appellee does not contend otherwise in its brief, and it is therefore undisputed.

B. The Appellee's Own "Expert" Witness Admitted That the Suitability of Particular Limestone for a "Chemical Industry" Use Was the Proper Test for Determining That Such Limestone Was of Chemical Grade.

As discussed more fully hereafter, Dr. Bowles, appellee's "expert" witness from the Bureau of Mines admitted that the suitability of a limestone for use in a "chemical industry" was the proper test to determine whether a particular limestone is "chemical grade." [Ex. 23, p. 89.]

This important admission establishes that taxpayer's limestone used in producing cement (an admittedly chemical industry) is "chemical grade limestone."

C. Appellee's Argument on "Chemical Grade Limestone" Is Based on Its Assertion That Such Phrase Has an "Accepted" Meaning. This Assertion and Such Argument Are Contrary to the Record Facts.

1. Introduction.

As pointed out in taxpayer's opening brief (pp. 8-11) and as admitted by appellee (Br. p. 20), taxpayer is aggrieved by the trial court's decision that its limestone is not "chemical grade" under Section 114(b)(4)(A).

The appellee has failed to answer taxpayer's showing (Op. Br. pp. 16-17) that the issue of whether taxpayer's limestone is or is not "chemical grade limestone" is a mixed question of law and fact, and that this Court is

not bound by the trial court's finding under Rule 52, F. R. C. P.

Simply stated, the issue is whether taxpayer's limestone⁴⁷ is "chemical grade limestone" and thus subject to the 15% rate of depletion provided in Section 114(b)(4)(A).

2. There Is No "Accepted" Meaning of the Phrase "Chemical Grade Limestone."

Basically, appellee argues that there is an "accepted" meaning of the term "chemical grade limestone." (Br. p. 23.) Such assertion finds no support in this record.

(a) The Testimony of Dr. Bowles Was That the Term "Chemical Grade Limestone" Was Not Used in Industry or Commerce.

As pointed out in taxpayer's opening brief (pp. 14-15) Dr. Bowles admitted that he had no knowledge of the use of the phrase "chemical grade limestone" in the lime industry, the glass industry, the alkali industry, or any other industry he classified as "chemical." [R. 122-123.] He also testified that he had never used the term "chemical grade limestone" in his 35 years with the Bureau of Mines, nor had he ever seen it used in official publications. [R. 123.]

Dr. Bowles also admitted that the reason he (personally) classified taxpayer's limestone as not being "chemical grade" was because he believed that the cement industry was not a chemical industry [Ex. 23, p. 89], and hence necessarily admitted that whether a particular limestone was "chemical grade" or not depended entirely on the

⁴⁷Although appellee admits at page 3 of its brief that taxpayer operates a "limestone quarry" and "mined limestone" it thereafter persists in referring to such "limestone" as "calcium carbonate rock."

“chemical” character of the industry and *not* any arbitrary chemical analysis test.

Appellee attempts to support its contention that the term “chemical grade limestone” has an “accepted” meaning by referring to one isolated spot in Dr. Bowles’ deposition. [R. 124-126.] At this place (Dr. Bowles having previously admitted that he had no “knowledge” of the use of the term in industry or commerce), artfully led by counsel, over objection, the following testimony occurred [R. 124]:

“Q. Have you ever heard the term, Chemical Grade Limestone, used in the limestone industry?

A. Do you mean by the producers themselves?

Q. Yes. A. I cannot recollect at this time, no.”

Taxpayer submits that it is thus undisputed that there is no “accepted” meaning for “chemical grade limestone.” Dr. Bowles’ *conclusions* are (1) not facts; and, (2) no stronger than the facts he relies upon to make his conclusions—*i.e.*, merely that certain industries buy limestone containing more calcium than do other industries. This falls far short of the “accepted” or “ordinary” meaning intended by Congress.

(b) *Appellee Argues That Chemical Grade Limestone Is Limestone of a Relatively High Calcium Carbonate content, but Offered no Serious Rebuttal to Taxpayer’s Showing That Such Meaning Was Not Known to Industry.*

Taxpayer’s proof established that there was no “accepted” or “ordinary” meaning for “chemical grade limestone” in commerce or industry. [Ex. 23, R. 122.]

Appellee, when asserting there is an “accepted” meaning of chemical grade limestone neglects to advise the court

that in other reported cases (*e.g.*, *Wagner Quarries Co. v. United States*, 154 Fed. Supp. 655, at 659) it agreed that there was no “commonly understood commercial meaning.” Congress intended that “The names of all the various enumerated minerals are of course intended to have their commonly understood commercial meaning . . .” (Sen Finance Committee Rep. No. 781, 82nd Cong., 1st Sess., p. 38.)

D. No Decided Case Has Held That Limestone Suitable for Use in a Chemical Industrial Application Is Not “Chemical Grade Limestone.”

Appellee misleadingly seeks to create the impression that several courts have passed on the question here presented, and have decided the issue adversely to taxpayer. This is not true.

The two cases of *Riverside Cement Co. v. United States* (S. D. Calif.), decided September 30, 1958 (58-2 U. S. T. C. par. 9905), and *California Portland Cement Company v. Riddell* (S. D. Calif.), decided November 21, 1958 (59-1 U. S. T. C. par. 9156), appeal pending (C. A. 9th) cited by appellee (Br. p. 21) were both decided by Judge Mathes, who decided this case. Understandably, Judge Mathes has been consistent.

In the case of *Dragon Cement Co. v. United States*, 144 Fed. Supp. 188, 189 (D. C. Me.), reversed 244 F. 2d 513 (C. A. 1st, 1957), cert. den. (1957) 355 U. S. 833, the question of the proper *rate* of depletion was not reached by the Court of Appeals. The District Court decision is not an authority, here, or even persuasive, in view of the glaring error in statutory construction by that court which resulted in reversal on the “commercially marketable product issue,” and more importantly, the tax-

payer there sought only a 10% rate on its rare friable calcium carbonate material called cement rock.

As pointed out by taxpayer (Op. Br. pp. 24-25) the *Wagner Quarries* case⁴⁸ directly supports taxpayer's contention that its limestone, suitable for an industrial chemical use, is "chemical grade limestone" and entitled to the 15% rate. Appellee's citation of *Wagner Quarries* (Br. p. 22) is typical. Appellee (as is its practice) selects an isolated statement which *appears* to support appellee's argument. However, when read in context with the facts and the rest of the opinion, the appellee's reliance on the quoted language is misplaced. As the District Court points out (and the Court of Appeals approved), "suitability" is the test—not an arbitrary chemical content test. Finally, use in a cement process was found in the *Wagner* case to be a "chemical" use.

The question here presented was not considered in the case of *Iowa Limestone Co. v. Commissioner*, 28 T. C. 881. In that case the principal issue was what was the "commercially marketable product." The second issue was whether taxpayer's limestone, which was 95% carbonates, was "chemical grade." The Court held that it was. The Court was clearly right in its decision, since such limestone was "suitable" for use in industrial chemical applications. However, since the Tax Court did not have before it a limestone averaging 85% carbonates for the year 1951 (as is taxpayer's here) any expression of contrary opinion not necessary to the decision is dicta. In

⁴⁸*Wagner Quarries Co. v. United States*, 154 F. Supp. 655 (D. C. N. D. Ohio, 1957) ; affirmed, *United States v. Wagner Quarries Co.*, 260 F. 2d 907 (C. A. 6th, Nov. 14, 1958).

addition, even the Tax Court's statement quoted by appellee (Br. p. 22) can have one of two meanings:

- (1) That *any* limestone which is less than 95% carbonates is not "chemical grade"; *or, more reasonably,*
- (2) Merely that *a* 95% carbonates limestone is clearly "chemical grade."

The meaning which disposes of only the issue before the Court is, we submit, the proper construction—*i.e.*, that the 95% carbonates limestone there in issue was held to be "chemical grade," and that the Court did not pass on other limestone of lesser carbonates content not before it.

To the extent that the *Iowa Limestone* case is construed otherwise, taxpayer submits it is clearly error.

Appellee cites but one other case, *Virginian Limestone Corp. v. Commissioner*, 26 T. C. 553 (Br. p. 24), which, as the appellee admits (Br. p. 22), invalidated the appellee's "end-use" regulation. (Reg. 111, Sec. 29.23(m)-5.) The *Virginian* case is not relevant to the issue here presented since neither party is here contending for an end use test, and that was the issue *Virginian* decided.

E. Appellee Cannot and Does Not Explain Why It Has Repudiated Its Express Earlier Ruling That "Calcination" Is a Chemical Process and That Limestone Suitable for Calcination Is Therefore "Chemical Grade."

As taxpayer pointed out in its opening brief (Op. Br. pp. 29-30) the crux of appellee's Revenue Ruling 56-582 (C. B. 1956-2, 981), (apart from the invalid "end-use" test), was the admission therein that "*since*" "calcination" was a "chemical process" any "calcium carbonate" used for producing lime by calcination was therefore "chemical grade limestone."

Appellee attempts to dismiss such admission in its own earlier (until judicially disapproved) regulation by stating that the end-use test is “no longer being urged.” It also superfluously points out that lime is not cement. But *nowhere* does appellee attempt to rebut the scientific fact and cold logic that since calcination is a chemical process, a limestone suitable for “calcination” is by definition, “chemical grade limestone.”

Parenthetically, it should be noted that, again, appellee overstates its case. Although appellee asserts that: “the record here is clear that the taxpayer’s deposit could not be used in the production of lime [Ex. 23, R. 127],” the quoted reference does not support it. Dr. Bowles, the “insulated” expert witness who had no “knowledge” of industry use of the phrase “chemical grade limestone” there asserted that: “*A large part* of the lime manufactured in the United States is made from stone running more than 98 per cent calcium carbonate.” Appellee has converted “a large part of” to “all”—which taxpayer submits is somewhat different. In actual fact, limestones of carbonates content comparable to taxpayer’s annual average are used in some areas to make lime where higher carbonates content limestone is unavailable. In California, of course, the availability of naturally occurring higher carbonates content limestone requires that to produce lime taxpayer’s deposit need only be selectively quarried or sorted after quarrying into 95% limestone and limestone of lesser carbonates content. Appellee could have easily ascertained this elementary industry fact. However, the practice turns on economic feasibility—not chemical feasibility.

F. There Is No Applicable Valid Treasury Regulation.

Treasury Regulations 111, Sections 29.23(m)-5, is the so-called “end-use” test held invalid in the *Wagner Quarries* and *Virginian Limestone* cases, *supra*. Knowing this, appellee cites such Regulation to this Honorable Court (Br. p. 21) without at the same place advising of its rough handling by judicial decisions. By the same token, the Commissioner’s Proposed Treasury Regulations, 24 Fed. Register, No. 28, pp. 975-976 (Br. p. 22) are irrelevant to the present issue, in clear derogation of the statute, and an attempt to arbitrarily substitute his own concept for the “chemical grade” test provided in Section 114(b)(4)(A)(iii), and are not now in effect. If they are issued, litigation will result.

G. A Depletion Allowance Having Been Granted, the Commissioner Has No Right or Power to Whittle Away What Congress Has Provided.

Appellee inaccurately characterizes the depletion allowance as “tax-free” compensation. (Br. p. 12.) None of the cited cases contain such phrase.

In the case of *Dragon Cement Company v. United States*, 244 F. 2d 513 (C. A. 1st, 1957), cert. den., 355 U. S. 833 (1957), Chief Judge Magruder accurately described the judicial function in these depletion cases, as well as the true description of the return of risk capital under depletion allowances as follows:

“The allowance for depletion has been a controversial subject for years, and officials of the executive branch have sought from time to time, with conspicuous lack of success, to persuade the Congress to eliminate some of its alleged overgenerous

features. See Mertens, Law of Federal Income Taxation §24.04 (1954). We are not concerned with the wisdom or policy of the statutory allowance, once we are sure what the allowance is, for it is plainly our judicial function merely to apply the allowance as Congress wrote it and meant it.

“The need for and fairness of some allowance for depletion proceeds from the fact that the production of income through the exploitation of natural resources is accompanied by an inevitable consumption of capital in the form of the gradual exhaustion of the natural resources being exploited. Thus the allowance serves to offset the injustice of classifying only as income what might be regarded as income comingled with return of capital, and serves also as an incentive to encourage capital expenditures in the direction of discovery and exploitation of natural resources.”

As the Supreme Court says in *Commissioner v. Southwest Explor. Co.*, 350 U. S. 308, 100 L. Ed. 347 (1956) (p. 312):

“An allowance for depletion has been recognized in our revenue laws since 1913. It is based on the theory that the extraction of minerals gradually exhausts the capital investment in the mineral deposit. Presently, the depletion allowance is a fixed percentage of gross income which Congress allows to be excluded; this exclusion is designed to permit a recoupment of the owner’s capital investment in the minerals so that when the minerals are exhausted the owner’s capital is unimpaired.”

As the Supreme Court stated in *Helvering v. Mountain Producers Corporation*, 303 U. S. 376, 381 (1938):

“. . . Congress was free to give such arbitrary allowance (percentage depletion) . . .”

Since Congress has admittedly granted the deduction, it becomes a matter of statutory construction whether the taxpayer is entitled thereto. For example, in *Lewyt Corporation v. Commissioner*, 349 U. S. 237, 99 L. Ed. 1029 (1955), the Court said (p. 240):

“But the rule that general equitable considerations do not control the measure of deductions or tax benefits cuts both ways. It is as applicable to the Government as to the taxpayer. Congress may be strict or lavish in its allowance of deductions of tax benefits. The formula it writes may be arbitrary and harsh in its applications. But where the benefit claimed by the taxpayer is fairly within the statutory language and the construction sought is in harmony with the statute as an organic whole, the benefits will not be withheld from the taxpayer though they represent an unexpected windfall. See *Bullen v. Wisconsin*, 240 U. S. 625, 630, 60 L. ed. 830, 835, 36 S. Ct. 473.” (p. 240, L. Ed. p. 1033.)

Applying this settled principle to this case, as the Court stated in *Virginian Limestone Corp. v. Commissioner*, 26 T. C. 553 (1956) when construing Section 114(b)(4):

“. . . The provisions of the statute here involved are specific and free from ambiguity. In such situation, there is no room for an interpretation, by the Commissioner or by the courts, which would vary (either upward or downward) the stated rates for specifically identified minerals, which Congress has provided.”

V.

CONCLUSION.

The appellee's basic position in this case, reflected throughout its Brief, is that Congress has extended the percentage depletion too far. Thus the appellee states that the inclusion of "additives" is "unsound" (Br. p. 12) and "indefensible." (Br. p. 15.) Appellee attempts to limit and restrict taxpayer's deduction to an amount computed under the Commissioner's repudiated rules, even though a greater amount is allowable under the clear and unambiguous language of the statute. Regardless of whether or not the Commissioner likes percentage depletion or feels that Congress has extended it beyond the point that it should have, he is bound to carry out the provisions of the statute as written.

The trial court's decision on "additives" applying the simple, unambiguous rule enacted by Congress, and holding that the depletion for taxpayer's limestone is to be computed on the selling price of cement, the "commercially marketable mineral product" obtained from such limestone, is correct and should be affirmed.

Even if this Court were to accept appellee's theory that additives should be excluded, the judgment of \$264,435.41 should nevertheless be affirmed, since the proper computation of such exclusion results in the identical depletion allowance found by the trial court. (As demonstrated at p. 33, *supra*.) However, should this Court decide not only that additives should be excluded, but that the method of exclusion should be the arbitrary allocation pressed by appellee, the judgment should be modified from \$264,435.41 to \$249,730.50 (as computed at p. 35, *supra*), and as modified, affirmed.

The trial court's decision that taxpayer's limestone is not "chemical grade limestone" was incorrect and should be reversed, since the record shows that Congress intended such phrase to mean any limestone suitable for an industrial chemical application.

Wherefore, we pray this Court to modify the judgment and the Findings of Fact and Conclusions of Law by striking the word "not" in Finding of Fact V [R. 64] and Conclusion of Law IV [R. 70] and substituting the words and figures "fifteen (15)" for "ten (10)" in Conclusion of Law IV [R. 70], and affirming the judgment in all other respects.

Respectfully submitted,

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APPENDIX "A"

The Legislative History of "Gross Income From Mining" and Section 114(b)(4)(B)

Percentage depletion for minerals other than oil and gas was first allowed by the Revenue Act of 1932. Prior to that time, however, the Staff of the Joint Committee on Internal Revenue Taxation made a study of percentage depletion for metal mines and submitted a preliminary report to the Committee.¹ Mr. Alex R. Shepherd, mining engineer for the Joint Committee, submitted a technical report which was attached as Appendix XXXI to the Staff's report to the Committee. This Shepherd report recommended percentage depletion for metal mines computed on "gross income from the property," and discussed the meaning of this term. At page 68 Mr. Shepherd states:

"It will be necessary to define what is meant by gross income from the property and to definitely indicate the point in accounting at which it is to be determined as well as other details. This can be done, either in the act, or interpreted in the regulations.

"The consensus of opinion seems to be that the act should be written as simply as possible (as in the case of oil and gas) and the necessary definitions should be written into the regulations."

The report recommended (pp. 70-71) that the statute provide that, in the case of metal mines, the allowance for depletion be "15% of the gross income from the property," subject to a limitation of 50 per cent of

¹Reports to the Joint Committee on Internal Revenue Taxation from its Staff, Vol. 1, Part 8 (1929).

net income from the property. In respect to the computation of "gross income from the property," the report further states (pp. 71-72):

"In the case of the smaller operator, the product in most all cases is sold in the crude or semi-refined (concentrate) state to smelter under contract or otherwise.

"The smelting after weighing and sampling the ore or concentrate renders the seller a statement setting forth:

"The gross metallic contents of the shipment.

"Net metallic contents and market quotation.

"Deduction for all costs, of freight, treatment, penalties, etc.

"Net value in dollars and cents to seller (known as the net smelter returns) and a check in favor of seller for the product sold. Each ore shipment to the smelter is generally liquidated in the above manner.

"Therefore, in the case of 90 percent (in numbers) of the taxpayers their gross income from the property is the smelter return settlement, less royalty due lessors." (Emphasis supplied.)

This language clearly indicates an intent to compute the depletion allowance on the selling price of the concentrates, *which are shown to be the commercially marketable products in the case of 90 per cent of the miners.*

When the depletion allowance for metal mines was added to the statute in 1932, the statutory language followed Mr. Shepherd's suggestion; that is, the statute provided a depletion allowance for metal mines computed as 15 per cent of "gross income from the property," with the definition of "gross income from the property" left to regulations.

The Bureau seems to have originally followed Mr. Shepherd's suggestions as to the computation of "gross income from the property." While the regulations did not expressly state the commercially marketable mineral product rule, they did provide for the inclusions in computing gross income, of certain enumerated processes and similar processes as well. Moreover, although there are no published rulings under these regulations showing how they were applied, the later legislative history does show what Congress was told regarding the Treasury interpretation.

The Bureau did not *originally* limit the processes includable in determining gross income from the property to those specifically listed in the regulations, but did allow many others to be included.² Congress was told in 1942 that the Treasury had taken the position that gross income was to be based on the first marketable product. Thus, if the mine owner sold his first marketable product, the gross income was based on the value of that product; if he applied further processes after obtaining the marketable product, an allocation had to be made.³ But Congress was told at the same time that the Treasury had changed its position as to cinnabar ore from which mercury is obtained and was trying to exclude processes applied before the commercially marketable product was obtained.⁴ A member of the Ways and Means Committee was "astonished" to learn that the Treasury was seeking to cut off the computation of the deduction for cinnabar ore before income could be realized from the ore.⁵

²Hearings before the Committee on Finance on the Revenue Act of 1943, 78th Cong., 1st Sess., pp. 527-528.

³Hearings before the Committee on Ways and Means on Revenue Revision of 1942, 77th Cong., 2d Sess., pp. 1199, 1202.

⁴*Ibid.*

⁵*Ibid.*

When this change in practice as to cinnabar ore was brought to the attention of Congress in 1942, the Treasury urged that the matter should be handled administratively, promising that it would adhere to its *original* regulations and *procedures*, urging that Congress not act.⁶ Congress in 1942 relied on this representation, but the Treasury apparently did not adhere to its original position as it said it would. In addition, in 1943 Congress was given the further information that the Treasury had been seeking since 1941 to exclude all processes not specifically listed in the regulation.⁷ In the light of this situation, Congress enacted, in Section 124(c) of the Revenue Act of 1943, the statutory definition of "gross income from the property." (Sec. 114(b)(4)(B), I. R. C. 1939.)

In explaining the new provision, which originated as an amendment in the Senate Finance Committee, the Committee stated:

"The purpose of the provision is to make certain that the *ordinary treatment processes which a mine operator would normally apply to obtain a marketable product* should be considered as a part of the mining operation, and to give reasonable specifications of what are to be considered such processes for various kinds or classes of mines.

"The law has never contained such a definition, and its absence has given rise to numerous disputes.

"The definition here prescribed expresses the congressional intent of these provisions as first included in the law, and is in accord with the original regulations and the Bureau practices and procedures thereunder. It is therefore made retroactive to the date

⁶88 Cong. Rec., Part 6, October 10, 1942, p. 8033.

⁷*Supra*, footnote 2.

of such original provisions" [Emphasis supplied].
Sen. Rep. 627, 78th Cong., 1st Sess., pp. 23-24, 1944
C. B. 991.

The logic of the purpose of this part of Section 114(b) explained above, is especially clear in view of what Congress sought to accomplish through its enactment. Congress was seeking to end numerous disputes, caused by the Treasury's attempt to whittle away at the depletion deduction. Congress wanted a simple, practical, definite rule. Certainly the rule adopted was the one best suited for that purpose, since, where there is a marketable product, the market price can easily be ascertained and used as a basis for computing the deduction.



NO. 16067

COURT OF APPEALS

for the Ninth Circuit

ULYSSES E. WILLIAMSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE

*On Appeal from the Judgment of the United States
District Court for the District of Oregon.*

FILED

NOV - 5 1958

PAUL P. O'BRIEN, CLERK

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NO. 16067

COURT OF APPEALS

for the Ninth Circuit

ULYSSES E. WILLIAMSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE

*On Appeal from the Judgment of the United States
District Court for the District of Oregon.*

OPINION BELOW

The judgment of the District Court was rendered without an opinion.

JURISDICTION

Jurisdiction of the District Court is conferred by 18 USC § 3231. Jurisdiction of this Court to review the judgment of the District Court is conferred by 28 USC §§ 1291 and 1294(1) and Rule 37(a), Federal Rules of Criminal Procedure.

STATUTES INVOLVED

26 USC § 4705(a)—

“It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.”

26 USC 4704(a)—

“It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.”

21 USC § 174—

“Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

"For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954."

Rule 7(d)—Federal Rules of Criminal Procedure—

"Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information."

STATEMENT OF THE CASE

The appellant was indicted in nine counts for violation of the federal narcotic laws. The first three counts of the indictment relate to a single sale and possession of heroin by appellant on September 21, 1957, Count I alleging appellant sold the heroin not in pursuance of a written order form, in violation of 26 USC § 4705(a), Count II alleging that appellant sold the same heroin not in or from an original stamped package, in violation of 26 USC § 4704(a) and Count III alleging that appellant received, concealed and facilitated the transportation and concealment of the same heroin which appellant knew had been illegally imported into the United States, in violation of 21 USC § 174. Counts IV, V and VI similarly charge the appellant with a second sale and possession of heroin on September 22, 1957. Counts VII, VIII and IX charge appellant with a third sale and possession of heroin on September 24, 1957.

The appellant was tried before a jury which found him guilty as charged in each of the nine counts of the indictment.

The government's evidence showed that on September 21, 1957 the appellant was introduced to Lavern E. Gooder, a federal narcotic agent, by an informant named George Williams, at Williams' apartment. After a short conversation, the appellant left George Williams' apartment and drove the narcotic agent to the appellant's residence. When inside the residence, the appellant asked the narcotic agent, "How much are you going to need to straighten you out?" and the narcotic agent replied that he would need "A spoon." (Tr. 17). Appellant went out of the room and returned with four capsules of heroin wrapped in cellophane paper, which he gave to the narcotic agent in exchange for fifty dollars in identifiable government funds (Tr. 18).

The narcotic agent testified that on September 22, 1957 he telephoned the appellant and asked, "Can you do anything for me?" The appellant responded that he could, and arranged to meet the agent in the men's room at the Greyhound Bus Depot in Portland, Oregon in half an hour (Tr. 29). At one-thirty p.m. on that day, the appellant came to the men's room in the Greyhound Bus Depot and placed a cellophane package containing four capsules of heroin in the coin-return slot in the pay telephone and received fifty dollars from the narcotic agent in identifiable government funds (Tr. 30, 31).

The same narcotic agent again called the appellant

by telephone on September 24, 1957 and asked appellant "if he could take care of me for three this time." The appellant indicated that he could and arranged to meet the agent in ten or fifteen minutes in the men's room at the Greyhound Bus Depot. The agent also asked the appellant, "what the tariff would be" and was advised by the appellant that it would be "a bill and a half," meaning one hundred and fifty dollars (Tr. 35). At approximately 11:25 a.m. on that day, the appellant came to the men's room in the Greyhound Bus Depot and deposited a cellophane package containing six capsules of heroin in the coin-return slot of the pay telephone. The appellant was arrested by the federal narcotic agent and the other officers at that time (Tr. 35, 37).

No written order form passed between the federal narcotic agent and the appellant in connection with any of these three transactions nor were there any revenue stamps on the cellophane wrapper or the capsules contained therein (Tr. 18, 21, 32, 37, 45). Each of the capsules was later determined by the government chemist to contain heroin hydrochloride (Tr. 4-6).

The government advance funds used by the federal narcotic agent in connection with the first two sales of heroin were later found in possession of the defendant in his clothing at his apartment and identified by serial number as being the same currency used in these sales (Tr. 77, 78).

Appellant testified that he had met the narcotic agent in a tavern and that the narcotic agent had represented to the appellant that he needed some "stuff" for

a girl that worked in a house of prostitution in Kelso, Washington, whom the agent was trying to take to the Oregon State Hospital for a narcotic cure. Appellant testified that he knew some people by the name of George Williams and Vicky Henderson who had taken the cure and might have some "stuff." Appellant further testified that he sent the agent out to George Williams and Vicky Henderson and that they refused to sell the "stuff" to him, but that they sold it to the appellant, who in turn sold it to the narcotic agent for the same price for which he purchased it on each of the three occasions.

Appellant was found guilty by the jury on all counts and was thereafter sentenced to imprisonment and to pay a fine. This appeal followed.

ARGUMENT

I. The Court properly refused to allow cross-examination of government witnesses as to collateral, irrelevant and immaterial matters.

The appellant claims that the court unduly restricted the cross-examination of the federal narcotic agents and the other government witnesses with respect to the reason the informer, George Williams, cooperated with the narcotic agents.

Narcotic Agent Gooder testified that he was introduced to the appellant by George Williams at Williams' apartment. Shortly thereafter the appellant took the narcotic agent to his own residence in another part of the city (Tr. 13, 14). The first sale of heroin took place

at the appellant's residence and the second and third sales occurred at the Greyhound Bus Depot. The record is clear that the informer, George Williams, was not present at the time of any of the three sales of heroin. His only function was to introduce the narcotic agent to the appellant.

On cross-examination of Narcotic Agent Gooder, appellant brought out that George Williams had "set up" the appellant by introducing him to the narcotic agent. Appellant then sought by cross-examination to show that the informer, George Williams, had been apprehended for violation of the narcotic laws and was apparently being granted immunity in exchange for his cooperation with the narcotic officers in introducing them to the appellant (Tr. 42, 43, 46-50).

The reason the informant, George Williams, was willing to cooperate with the narcotic officers is immaterial to any issue in the case. George Williams was not a witness. His credibility, motive or bias were not in issue.

In *Beasley v. U. S.*, D.C. Cir. 1954, 218 F.2d 366, the court upheld a similar restriction on cross-examination as to immaterial matters. The defense counsel had asked the narcotic agent as to who introduced him to the informant and as to how the narcotic agent knew the name of the informant. The court ruled that these questions were immaterial.

It is well-settled that the extent of cross-examination, particularly as to collateral matters, is peculiarly within the discretion of the trial court. *Dolan v. U. S.*, 8 Cir.

1955, 218 F.2d 454; *U. S. v. Manton*, 2 Cir. 1938, 107 F.2d 834.

In *U. S. v. Ginsburg*, 7 Cir. 1938, 96 F.2d 882, the exclusion on cross-examination of an informer dope addict of the question as to where he secured the narcotics that he had just taken, was sustained as being clearly within the court's discretion in limiting cross-examination.

In *Mims v. U. S.*, 9 Cir. 1958, 254 F.2d 654, this court recently held that the discretion of the trial court is large with respect to collateral evidence on cross-examination. Apparently the district court refused to allow appellant "to inquire into the business relationship" between appellant and the father of his alleged accomplice.

A. Court may require counsel to indicate materiality of proposed cross-examination and may exclude the same if it merely relates to collateral, irrelevant or immaterial matters.

It is equally clear that on cross-examination, the court may refuse to permit a question without an adequate statement from counsel indicating the relevancy thereof. *U. S. v. Easterday*, 2 Cir. 1932, 57 F.2d 165.

In the present case, the court inquired of counsel for appellant as to how the question could be relevant (Tr. 43, 48, 49) and received the response, "The purpose I have in mind is here we have a person who is admittedly guilty of a crime involved in the exact transaction which my defendant is in, and I am entitled to present that to the jury to see whether Williams instead of Williamson is not the guilty party."

Appellant's counsel also cited at that time, "U. S. v. Moses and U. S. v. Sawyer," in support of his contention, which cases appellant later admitted did not support his view (Tr. 64).

Appellant has now relied upon *Alford v. U. S.*, 1931, 282 U.S. 687, for the general rule that on cross-examination the examiner need not always indicate the purpose of his inquiry. The court's ruling in the present case was in an entirely different situation than found in the *Alford* case. In that case, the excluded question asked the witness was, "Where do you live?" In response to the court's inquiry as to the materiality of the question, counsel pointed out that he had information that the witness was in the custody of the government and defendant should be able to show this for the purpose of impeaching the credibility of the witness for bias or prejudice.

In the present case, the question excluded on cross-examination did not relate to the credibility, bias, prejudice or motive of the witness, but referred only to the collateral matter as to what motive or reason the informer had for cooperating with the narcotic agent.

The right of the trial judge to inquire as to the materiality of questions on cross-examination and the application of the *Alford* case to this situation has been carefully analyzed by Judge Learned Hand in *U. S. v. Easterday*, 2 Cir. 1932, 57 F.2d 165:

"And even if it was obviously cross-examination, it was reasonable for the judge to ask why he wished the answer. True, as *Alford v. U.S.* makes plain, it is impossible for a cross-examiner to de-

clare in advance what he can prove; he cannot tell till he has inquired. Yet it is fair to ask of him how the question can be relevant; what is the purpose of the inquiry. Cross-examination should not extend to aimless shots at random; a trial presupposes rational processes applied to the testimony uttered. The judge was not bound to allow what on its face had no bearing on the witness's credibility; the question was not inevitably and patently material. The situation thus was quite different from that in *Alford v. U.S.*, where the defendant put as a ground that he had been told that the witness was in the custody of the prosecution."

Similarly, in *U. S. v. Remington*, 2 Cir. 1933, 64 F.2d 386, the trial court's refusal to allow defendant to inquire on cross-examination, in a prosecution for the crime of accepting a bribe, as to where the person who gave the bribe secured the money, was approved. The court held that it was not error to so limit cross-examination as to this immaterial matter, specifically pointing out that it did not think the rule in the *Alford* case "should be pushed so far."

B. Government is not required to produce a witness which it deems unnecessary to its case.

This court has often held that it is the prosecution's function to determine which witnesses it will select to establish the guilt of the accused. Process is available to appellant to call additional witnesses if he desires to do so:

Ferrari v. U. S., 9 Cir. 1957, 244 F.2d 132.

Love v. U. S., 9 Cir. 1935, 74 F.2d 988.

Cummins v. U. S., 9 Cir. 1926, 15 F.2d 168.

See also, *U. S. v. Colletti*, 2 Cir. 1957, 245 F.2d 781.

The *Ferrari* case, *supra*, is particularly applicable. It was also a narcotics case in which appellant contended the government should have produced a certain female special employee. The attorney for the defendant served a subpoena upon the head of the narcotics office at San Francisco, who informed the attorney that he had no idea of the whereabouts of the special employee and had no intention of finding her. This court held:

“The appellee was under no obligation to look for appellant’s witnesses, in the absence of a showing that such witnesses were made unavailable through the suggestion, procurement, or negligence of the appellee.” (at p. 141)

In addition, this court cited with approval the following language from *Thomas v. U. S.*, D.C. Cir. 1946, 158 F.2d 97:

“‘Appellant must plead and prove his own case and is responsible for the production in court of witnesses necessary to do so.’” (at p. 142)

In the *Ferrari* case, the appellant also made the contention that the government failed to produce the witness as it feared that the testimony would corroborate the contentions of the appellant. In pointing out that such arguments might be permissible to a jury, this court held that they had no place in a brief in an appellate court, as it embodied pure speculation, quoting with approval the following from *Deaver v. U. S.*, D.C. Cir. 1946, 155 F.2d 740:

“We know of no rule which holds it error for the government to fail to put on the stand a witness, not deemed necessary to its case, who might conceivably have given testimony favorable to the

defendant. It is for the defendant to make his own defense."

The record in this case shows that the defendant was arraigned on November 8, 1957 and the case tried on November 29, 1957. On November 14, 1957 the appellant placed in the hands of the U. S. Marshal a subpoena for George Williams. On November 18, 1957 the Marshal was advised by the Portland Police Department that George Williams was in Wyoming. At no time thereafter did appellant request that the U. S. Marshal make any effort whatever to serve the subpoena in Wyoming. At no time did appellant move that the government be required to produce the informer as a witness nor did the appellant move for a continuance of the case in order that the witness, George Williams, might be produced.

Appellant made no effort to locate or procure the attendance of George Williams as a witness during the ten days immediately preceding the trial after appellant had information of his general location in Wyoming. The government was not requested nor was it the government's duty to locate the witness for the defendant. In these circumstances no unfavorable inference against the government can be drawn from its failure to call this witness, who was equally available to either side. *Shurman v. U. S.*, 5 Cir. 1956, 233 F.2d 272.

The court's attention is also called to *U. S. v. Valdes*, 2 Cir. 1956, 229 F.2d 145, in which the court upheld the trial court's refusal to produce at the trial the informer who introduced the appellant to the narcotic

agent, because the likelihood that the witness, if produced, would have in any substantial way aided the defense, was extremely remote.

1. *Roviaro Case regarding Identity of Informer is Inapplicable.*

Appellant has cited, without discussion, the case of *Roviaro v. U. S.*, 1957, 353 U.S. 53, apparently in connection with the government's decision not to call the informer, George Williams, as a witness. Both the factual situation and legal issue in the *Roviaro* case are clearly distinguishable from the present case. In the *Roviaro* case, the sale of narcotics was made to an informant, whose identity the government refused to disclose.

In holding that the identity of such an informer must be disclosed whenever the informer's testimony may be relevant and helpful to the accused's defense, the court was careful to limit its ruling to the factual situation before it:

"This is a case where the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses. Moreover, a government witness testified that Doe denied knowing petitioner or ever having seen him before. We conclude that, *under these circumstances*, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee in the face of repeated demands by the accused for his disclosure." (at pp. 64, 65) (Emphasis supplied)

Certainly the record is clear in this case that appellant knew the identity of the informer, thereby relieving

the government of any duty to either disclose the name of the informer or otherwise produce him as a witness. *Sorrentino v. U. S.*, 9 Cir. 1947, 163 F.2d 627. The present case is more importantly distinguished, however, by the fact that the sale of narcotics was not made to the informer but to the federal narcotic agent who was called as a witness by the government. The informer was not present at the time of any of the three sales.

C. Appellant's contention that he was merely a "procuring agent" of the purchaser of the narcotics and therefore not guilty of sale of narcotics under the decision in "U.S. v. Sawyer," was resolved against appellant by jury's verdict under proper instructions.

Under its first assignment of error, appellant has cited *U. S. v. Sawyer*, 3 Cir. 1954, 210 F.2d 169, without discussion, but apparently in connection with appellant's claim that he was merely a messenger or a procuring agent for the purchaser of the narcotics and not a "seller" of narcotics or otherwise associated with the seller of narcotics. In the *Sawyer* case it was held to be error for the trial court to refuse to instruct the jury as to the difference between dealing with a purchaser as a "seller" and acting for the purchaser as a procuring agent, when the evidence as to the part played by the defendant in the transaction was conflicting. In the present case, the evidence as to the part played by the appellant in the transaction was also conflicting. The government's evidence showed that the appellant was introduced by an informant to a federal narcotic agent and the appellant thereafter, in the absence of

the informant, sold narcotics on three occasions to the federal narcotic agent. The appellant, however, testified to the effect that he was merely helping or assisting the purchaser as the purchaser's agent in securing narcotics from George Williams.

In view of this conflict in the evidence, the trial court, at the appellant's request, appropriately instructed the jury in accordance with the *Sawyer* case, that in the event the jury found that the appellant was not a dealer in or seller of narcotics but was only acting as an agent of the purchaser without any profit to himself, the appellant would not be guilty of selling or giving away narcotics as alleged in Counts I and II and the other similar counts in the indictment (Tr. 127). By its verdict finding the defendant guilty on all counts, the jury resolved this issue against the appellant.

The so-called "procuring agent theory," as set forth in the *Sawyer* case, however, does not apply to Counts III, VI and IX of the indictment. Due to the election made by the government at appellant's request prior to trial, these counts do not allege a "sale" of narcotics but merely the receiving, concealing and facilitating the transportation and concealment of the narcotics, in violation of 21 USC § 174.

This court has recently observed in *Bruno v. U. S.*, 9 Cir. 9/15/58, 15992, that in all of the cases concerning the "procuring agent theory," the government had relied solely on the "sale" portion of 21 USC § 174 and had not relied upon the "facilitating the transportation or sale" portion of 21 USC § 174.

It is therefore abundantly clear in the present case that the jury has resolved the procuring agent theory against the appellant and has found the appellant guilty of sale, in the counts alleging a sale under 26 USC §§ 4704(a) and 4705(a). It is equally clear that the procuring agent theory has no application to the counts which do not allege sale but merely the "facilitating the transportation" portion of 21 USC § 174.

In *U. S. v. Valdes*, 2 Cir. 1956, 229 F.2d 145, the defendant similarly attempted to assert the procuring agent theory in a case, like the present, in which the defendant had been introduced to the narcotics agent by an informant. Justice Medina summarily disposed of appellant's contention as follows:

"Appellant's reliance on the theory that defendant was merely a 'procuring agent' is misplaced, as it was the testimony of Miss Thomas [policewoman] that she met defendant for the purpose of purchasing a quantity of heroin from him and that she did so. We have no occasion to take any position with reference to the holdings by our brethren of the Third and Fifth Circuits in *United States v. Sawyer*, 1954, 210 F.2d 169 and *Adams v. United States*, 1955, 220 F.2d 297, where the facts bear little resemblance to those before us here." (at p. 148)

D. No claim of entrapment was made by appellant at the trial.

Appellant has cited *Sherman v. U. S.*, 1958, 356 U.S. 369, in which the Supreme Court of the United States recently found entrapment as a matter of law in a factual situation entirely different than this case.

At the trial, the appellant did not claim entrapment. When asked specifically by the court as to whether appellant was claiming entrapment, counsel for appellant responded:

“At the moment, your Honor, I do not have enough evidence in my possession to make such a claim, but I would like to develop this phase as to how—here we have a guilty man who has sold and has not been prosecuted involved in this capture.” (Tr. 48)

Appellant neither requested any instructions on the subject of entrapment nor took exception to the fact that the court did not submit the issue to the jury. Since the appellant did not assert the defense of entrapment, the government was precluded from rebutting such defense by showing the appellant's willingness and predisposition to sell narcotics. It is therefore clear that the defense of entrapment, not having been asserted at the trial, should not be made an issue for the first time on appeal. *U. S. v. Ginsburg*, 7 Cir. 1938, 96 F.2d 882.

The facts in the present case are somewhat similar to *Gonzales v. U. S.*, 9 Cir. 1958, 251 F.2d 298, in which an informant introduced the narcotic agents to the appellant and, as in the present case, the appellant thereafter, in the absence of the informant, made more than one sale of narcotics to the government agent. On these facts, this court held that there was nothing in the record to warrant the defense of entrapment, particularly in view of repeated sales, citing *Trice v. U. S.*, 9 Cir. 1954, 211 F.2d 513.

II. Court did not err in excluding portion of testimony of Dr. Norman K. David.

A mere reading of the testimony of the expert pharmacologist produced by the defense will demonstrate that the general discussion of the nature and effect of narcotics was not material to any issue in the case.

The government finally objected to a question as to whether the pharmacologist was able to detect a narcotic addict when the addict was under the influence of drugs. The fact that an addict, while under the influence of drugs, may appear normal, would hardly be relevant. More pertinent would be the question as to whether the appellant knew, because of his knowledge or experience, that narcotic users appeared normal even when using narcotics, which question, of course, could not be answered by the pharmacologist.

A. Appellant's claim that the pharmacologist's testimony showed that heroin could be "easily" made from morphine is untenable.

The process for manufacturing heroin from morphine was described in detail by the pharmacologist (Tr. 115, 116). Although appellant's counsel attempted to make it appear that heroin could be manufactured by simply adding warm vinegar to morphine, the pharmacologist was careful to point out that the process could be done "with any chemical laboratory with some simple facilities and the chemicals" (Tr. 115). Appellant's claim that the morphine could be obtained from the Oregon State Hospital was also precluded by the pharmacologist's testimony. This witness testified that

barbiturates and other depressant drugs were being used for the cure of drug addiction but did not testify that morphine was being used for this purpose (Tr. 114, 115). It follows that the purported defense that the heroin sold in this case was "easily manufactured from morphine" secured from the Oregon State Hospital is pure sham and fabrication.

B. Appellant's claim of possible defense under the Exempt Preparations Provision is frivolous.

The Exempt Preparations Provision of 26 USC § 4702(a) provides in part:

"(a) *Preparations of limited narcotic content*—The provisions of this subpart and sections 4721 to 4726, inclusive, shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing or possession of preparations and remedies which do not contain . . . more than one-eighth of a grain of heroin, . . . in 1 avoirdupois ounce; . . .

"PROVIDED, That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this subpart of sections 4721 to 4726, inclusive, PROVIDED FURTHER, That any manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies mentioned in this section, lawfully entitled to manufacture, produce, compound, or vend such preparations and remedies, shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Secretary or his delegate shall direct . . . and every such person so possessing or disposing of such preparations and remedies shall register as required in section 4722 and, if he is not paying a tax under section 4721, he shall pay a special tax of \$1 for each year, or

fractional part thereof, in which he is engaged in such occupation, to the official in charge of the collection district in which he carries on such occupation as provided in sections 4721 to 4726, inclusive."

The heroin sold in this case was not an exempt preparation of limited narcotic content. To so qualify it would have to contain not more than one-eighth of a grain of heroin in each ounce. The government chemist testified that the narcotics were approximately 7% heroin. This testimony was uncontested and no effort whatever was made to have the appellant's pharmacologist test the drugs.

Since there are 437 grains in one ounce, a 7% mixture of heroin weighing one ounce would contain 30.59 grains of heroin. It follows that the narcotics in this case contained over 244 times as much heroin as would be allowed by the Exempt Preparations Provision.

During the testimony of the appellant no attempt was made to show (a) that he kept records; or (b) was registered; or (c) paid the tax as required by 26 USC 4702(a), in order to further comply with the law with respect to exempt preparations of limited narcotic content. The excluded portion of the pharmacologist's testimony could not possibly have filled these gaps. The claim of a possible defense under this provision appears frivolous.

III. The instructions in their entirety fully and correctly presented the law in the case to the jury.

The court, when discussing with appellant's counsel the materiality of the testimony of a defense witness, commented that, "The question in this case is did this man sell narcotic drugs to somebody. That is the issue." (Tr. 118).

Appellant erroneously characterizes the statement by the court as an "instruction." Actually it was a mere explanation by the court to counsel for the appellant as to why the proposed testimony of the defense witness was immaterial as it did not relate to the question whether or not the appellant had transferred or sold any narcotics. It was clearly not an instruction directed to the attention of the jury.

Even if this were to be considered an instruction, the court's charge in its entirety fully and adequately stated the law for the jury. This court has many times held that if the instructions considered as a whole are free from error and fully advise the jury of the law of the case an assignment of error predicated upon an isolated sentence will be disregarded. This is particularly true when the detached statement did not mislead the jury and the instructions considered as a whole properly submitted the case to the jury.

Herzog v. U.S., 9 Cir. 1956, 235 F.2d 664.

Stein v. U.S., 9 Cir. 1948, 166 F.2d 851.

Nicholson v. U.S., 8 Cir. 1955, 221 F.2d 281.

Hargreaves v. U.S., 9 Cir. 1935, 75 F.2d 68.

Herzog v. U.S., *supra*, was an income tax evasion case in which the trial court gave in its instruction an

erroneous definition of the term "willfullness." The rule followed in this situation is plainly stated by the Court:

"In determining whether the giving or the failure to give an instruction warrants a reversal, the courts are not to consider the instruction in isolation. They are obliged to examine the charge as a whole in light of the factual situation disclosed by the record."

More specifically, in *Stein v. U.S.*, *supra*, the appellant also objected to a particular instruction isolated from the charge as given by the court. Judge Orr clearly stated the view of this court as follows:

"Some of the objections appear to be extremely technical and *other objections are directed to a particular instruction isolated from the charge as given by the Court.* We think the proper approach is to view the charge as a whole to determine whether or not the jury was properly and adequately instructed as to the law governing the case. We have followed that procedure here and careful consideration of the entire charge convinces us that the instructions given constituted a full, complete and adequate presentation of the law of the case to the jury." (Emphasis supplied.)

Detached phrases and sentences are not singled out and considered alone but construed in connection with the entire charge to the jury. In *Nicholson v. U.S.*, *supra*, the defendant was charged with conspiracy to unlawfully "transfer marihuana." In instructing the jury the court inadvertently on one occasion referred to an agreement "to sell marihuana." The appellant contended that this discrepancy in terminology was error. The court held that this was not reversible error since there could not have been any prejudice to the defendant

since the instructions, when considered as a whole, clearly defined and explained the charge beyond any possibility of misunderstanding. The government submits that in the present situation the instructions of the court fully and adequately explained the charge to the jury.

The only case cited by appellant in support of his position is *Nicola v. U.S.*, 3 Cir 1934, 72 F.2d 780, which bears little similarity to the present situation. In the *Nicola* case the court, during its regular instructions in an income tax evasion case gave an erroneous instruction as to the time when it would be considered that the defendant received certain income. The jury returned on two separate occasions to be reinstructed on the same subject. The Court of Appeals held that the instructions given on each of these occasions were erroneous, and even if one of them were correct, the court did not indicate to the jury which one was correct and did not withdraw any of the former instructions.

In the present case, however, the statement of which appellant complains was not addressed to the jury at all but was a statement to counsel explaining the reasons of the court for not admitting certain testimony. The statement made by the court was a correct statement of the law as far as the court went, indicating this case concerns the sale of narcotics without further stating all of the details with respect to order forms and stamped packages and the other technical requirements which were fully explained to the jury during the course of the court's instructions.

IV. Appellant's motion for acquittal was properly denied as there was substantial evidence to sustain the verdict of the jury.

A. Verdict of jury was based on substantial direct evidence and should not be set aside on review.

In each of the following cases this court on review has held that the verdict should not be set aside unless the court can say as a matter of law that the evidence is not sufficient to support it.

Blassingame v. U.S., 9 Cir. 1958, 254 F.2d 309.

Schino v. U.S., 9 Cir. 1953, 209 F.2d 67.

Stoppelli v. U.S., 9 Cir. 1950, 183 F.2d 391.

Davenport v. U.S., 9 Cir. 10/22/58, 15689.

In the *Blassingame* case the rule has been successfully stated as follows:

"Glasser v. United States, 315 U.S. 60, 80, 62 S. Ct. 457, 469, 86 L.Ed. 680, provides a standard for reviewing the sufficiency of evidence in a criminal prosecution:

'It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.' "

Most of the contentions made by appellant with respect to his motion for acquittal are based on the testimony of the appellant. A similar claim was made in the *Davenport* case, where the appellant also contended in her extensive testimony before the jury that she was innocent of any wrongdoing. This court pointed out, however, that these matters are for the jury to determine from all of the evidence in the case:

“It was for the jury to determine where the truth lay. They are not required to believe the appellant.”

The evidence in the case clearly demonstrates that a narcotic agent was introduced to the appellant by an informer and that thereafter the appellant, in the absence of the informant, sold heroin to the narcotic agent on three separate occasions. The jury was adequately and fully instructed as to the appellant's contention that he was a mere procuring agent or messenger for the narcotic agent. The jury, by its verdict of guilty, resolved this, and all of the other issues of fact, against the appellant.

B. Claim of entrapment as a matter of law made for first time on appeal is not supported by the record.

The subject of entrapment has been more fully discussed under Argument I-D in connection with our response to appellant's first assignment of error. At no time during the trial did appellant claim entrapment. No instructions were requested on the subject and no exceptions were taken because entrapment was not covered by the court's instruction. In neither the motion for acquittal at the close of the government's case nor the similar motion at the end of the case, did appellant claim that he should be acquitted on the ground of entrapment. The only theory advanced to the court was that the appellant was a mere procuring agent or messenger of the narcotic agent. Appellant's requested instruction in this regard was given and the issue of fact resolved against appellant by the verdict of the jury.

C. There is not any unfavorable inference against the government for not calling a witness accessible to both parties.

The subject of the absent witness was more fully discussed in this brief under Argument I-B in connection with the government's response to appellant's first assignment of error.

The facts in *Wesson v. U.S.*, 8 Cir. 1949, 172 F.2d 931, relied upon by appellant in connection with the absent witness are clearly distinguishable. In the *Wesson* case, the absent witness was a patient for whom the defendant physician had prescribed narcotics. During the course of the trial it developed that the prescription had been altered. The testimony of the absent witness with respect to the manner in which the prescription was changed became a matter peculiarly and uniquely within the knowledge of the absent witness. In the present case, however, all of the facts relating to the three transactions involved occurred within the personal observation of the witnesses produced by the government. The *Wesson* case has been distinguished on this ground in *U.S. v. Lessaris*, 7 Cir. 1955, 221 F.2d 211, which was also a case where the government elected not to call the informer as a witness.

As we have pointed out earlier, this court in *Ferrari v. U.S.*, 9 Cir. 1957, 244 F.2d 132, has made it plain that the contention that the government's failure to produce a witness because it feared that the testimony would corroborate the appellant's defense might be a permissible argument to a jury, but has no place in a brief in an appellate court, as such contention embodies pure speculation.

D. Evidence demonstrates appellant not within the "Surrender of Heroin" provisions of Narcotic Control Act of 1956.

Apparently it is appellant's contention that the surrender of heroin provision of the Narcotic Control Act of 1956 (18 USC 1402) provides an exception to 26 USC 4705(a) whereby any future sale of narcotics to a federal narcotic agent will not be subject to prosecution. The fallacy of this theory is readily seen by a mere reading of the statute:

18 U.S.C. § 1402. "*Surrender of Heroin—procedure.*

Any heroin lawfully possessed prior to the effective date of this Act shall be surrendered to the Secretary of the Treasury, or his designated representative, within one hundred and twenty days after the effective date of the Act, and each person making such surrender shall be fairly and justly compensated therefor. The Secretary of the Treasury, or his designated representative, shall formulate regulations for such procedure. All quantities of heroin not surrendered in accordance with this section and the regulations promulgated thereunder by the Secretary of the Treasury, or his designated representative, shall by him be declared contraband, seized, and forfeited to the United States without compensation."

Since this law became effective July 18, 1956, any person *lawfully possessing* heroin prior to July 18, 1956, was required to surrender the same to the Treasury Department prior to November 19, 1956. The Act does not provide for any surrender or sale to narcotic agents after that date.

It is obvious in this case that all three sales of narcotics occurred at least a year later, in September of 1957, and therefore were not within the surrender

provisions of the statute. It is equally clear that heroin could not be "lawfully possessed" subsequent to November 19, 1956. It follows that appellant's argument with respect to this provision of the Narcotic Control Act of 1956, which was enacted to provide for a more effective control of narcotic drugs, is wholly without merit.

V. The striking of surplusage from the indictment on the motion of the appellant was authorized by Rule 7(d) of the Federal Rules of Criminal Procedure.

A. The striking of surplusage from the indictment was clearly on the motion and with the consent of appellant.

Pursuant to Rule 7(c) of the Federal Rules of Criminal Procedure some of the counts in the indictment allege that the defendant committed the offense by more than one specified means. Pursuant to the appellant's motion the government was required to file an election as to upon which of the several means or ways alleged in the indictment the government intended to rely (Tr. Vol. I, page 8). Some of the means by which the indictment alleged the defendant committed the offense were therefore eliminated from the case and from the jury's consideration. For example with respect to Counts II, V and VII the indictment alleges "purchase, sell, dispense and distribute." In its notice of election the government indicated that it intended to rely only upon the specified means of "sell, dispense and distribute" and not upon the allegation of "purchase".

As the case was about to be sent to the jury the court inquired as to whether the eliminated words

should be obliterated from the indictment (Tr. 137). At that point the Assistant United States Attorney suggested that the notice of election (Tr. Vol. I, page 8) be sent to the jury with the indictment. The court then inquired of appellant's counsel as to whether the notice of election should be sent to the jury or should the surplus wording be stricken out to which counsel for appellant responded "it might be better to strike" (Tr. 138).

It is therefore abundantly clear that the surplus words were stricken from the indictment upon the motion and with the consent of the appellant.

Rule 7(d) is apparently based on the theory that if a defendant has power to waive an indictment altogether he certainly has the power to consent to the striking out of surplusage. The note to subdivision (d), Notes of Advisory Committee on Rules, states as follows:

"This rule introduces a means of protecting the defendant against immaterial or irrelevant allegations in an indictment or information, which may, however, be prejudicial. The authority of the court to strike such surplusage is to be limited to doing so on defendant's motion, in light of the rule that the guarantee of indictment by a grand jury implies that an indictment may not be amended. *Ex parte Bain*, 7 S.Ct. 781, 121 U.S. 1, 30 L.Ed. 849. By making such a motion, the defendant would, however, waive his rights in this respect."

B. Authorities relied upon by appellant are clearly distinguishable.

Appellant's reliance upon *Ex parte Bain*, 1886, 121 U.S. 1, is misplaced. Not only was the motion to strike certain words from the indictment made by the government in the *Bain* case but the words eliminated from the indictment related to a material ingredient of the crime charged. In the *Bain* case the defendant was charged with making a false report to the Comptroller of the Currency in violation of the banking laws. At the time of trial the *government* moved to strike out the words "the Comptroller of the Currency and" from the indictment. Since the indictment originally alleged that the defendant filed a false statement and report with intent to deceive "the Comptroller of the Currency and" other agents of the government it was certainly changing a material and essential part of the indictment to eliminate these words.

In this case, however, the motion to strike out the surplusage was made by and with the consent of the appellant. In addition the words stricken out were clearly surplusage. As we have noted the indictment alleged more than one specified means by which the offense was committed which procedure is proper under Rule 7(c) of the Federal Rules of Criminal Procedure. Due to the election which the government was required to make pursuant to the motion of the appellant some of the specified means by which the crime was alleged to have been committed were eliminated from the indictment. The Court's action was therefore simply the deletion from the indictment of an allegation which had

become unnecessary and impertinent due to the election which the government was required to make. This procedure is entirely consistent with the principle that it is proper to charge in the conjunctive the various allegations in the indictment where the statute specifies several means or ways in which an offense may be committed in the alternative. *Smith v. U. S.*, 5 Cir. 1956, 234 F.2d 385, 389.

Likewise *Carney v. U. S.*, 9 Cir. 1947, 163 F.2d 784 is distinguishable. Defendant had been charged with forging and counterfeiting "K-14H Gasoline Ration Coupons". Actually there never were any "K-14H Gasoline Ration Coupons" but there were "A-14H Coupons". The substitution of the words "A-14H" for "K-14H" was held to be fatal as it changed a material part of the indictment. In so ruling this court was careful to point out that the situation before it was more serious than the mere striking out of surplusage from an indictment. As we have demonstrated, however, the words stricken from the indictment in the present case were surplusage as they merely indicated the alternative means by which the crime may have been committed which were eliminated from the case by the government's election required by the motion of the appellant. Clearly if the court had changed the name of the narcotic which the appellant is alleged to have sold and possessed an entirely different situation would confront the court.

In *U. S. v. Krepper*, 3 Cir. 1946, 159 F.2d 958, 970, a similar deletion of words eliminating one of

the specified means by which a defendant committed the crime was held not to be an amendment to the indictment but a mere striking of surplusage. The court pointed out that an indictment is amended only when it is so altered to charge a different offense than that found by the grand jury, citing *Ex parte Bain*, supra. It is certainly not error to remove from the jury's consideration one of the specified means by which it is alleged that the defendant committed the crime:

"[18] It is also a settled proposition of law that when an indictment charges several offenses, or the commission of one offense in several ways, the withdrawal from the jury's consideration of one offense or one alleged method of committing it does not constitute a forbidden amendment of the indictment. *Goto v. Lane*, 265 U.S. 393, 403, 44 S.Ct. 525, 68 L.Ed. 1070; *Ford v. United States*, 273 U.S. 593, 47 S.Ct. 531, 71 L.Ed. 793.

"In view of the motion made by counsel for the Government, the purpose of which was not to alter or change the indictment but to show that the parties construed and understood the acts or accusations in a particular way, and in view of the fact that each Count of the Indictment charged the commission of the offense in two different ways, it would appear to be a far fetched strain of imagination to hold that the substance of the Indictment had been altered, modified or changed."

C. Appellant's contention regarding "amendment of the indictment" has no application to Counts I, IV and VII as no words were stricken from these counts.

As the government was not required to make any election as to the various specified means by which the appellant is alleged to have committed the crime alleged in Counts I, IV and VII there were no words stricken

as surplusage from these counts. The sentence received by appellant was less than the maximum allowed by law for any one count of the indictment and the sentence was allowed to run concurrently. It is well settled that the sustaining of appellant's conviction on any one of the counts of the indictment requires affirmance of the judgment below when the general sentence imposed on all counts was less than the maximum allowable on any single count. *Abrams et al. v. U. S.*, 1919, 250 U.S. 616; *Carney v. U. S.*, 9 Cir. 1947, 163 F.2d 784.

CONCLUSION

The verdict of the jury finding the appellant guilty on all counts is fully sustained by the evidence and the judgment should be affirmed.

Cross-examination by appellant was not unduly limited, as the court merely excluded irrelevant and immaterial testimony as to the reason the informer, who was not a witness, was willing to cooperate with the government.

The government produced all witnesses it deemed necessary to prove its case. The appellant had ample opportunity to request the presence of the absent witness if his testimony was desired for the defense.

At no time during the trial did appellant claim entrapment, request instructions on this defense or move for acquittal on this ground. The appellant did claim that he was merely a procuring agent of the purchaser of the narcotics and the jury was adequately instructed on this theory of defense.

The jury was fully and adequately instructed as to the law applicable to the case. The verdict of the jury resolved the issues of fact against the defendant. The jury apparently did not believe the appellant's testimony.

The other defenses submitted by the appellant, such as the Exempt Preparations Provision, the Surrender of Heroin Provision and the theory that heroin can be easily manufactured from morphine, have no basis in fact or law.

The striking of surplusage from the indictment was based on the motion of and with the consent of the appellant and was authorized by Rule 7(d) of the Federal Rules of Criminal Procedure.

It is respectfully submitted, therefore, that the conviction of the appellant is fully supported by the record and should be affirmed.

Respectfully submitted,

C. E. LUCKEY,
United States Attorney,
District of Oregon,
ROBERT R. CARNEY,
Assistant U. S. Attorney,
GEORGE E. JUBA,
Assistant U. S. Attorney,
Attorneys for Appellee.

No. 16072 ✓

United States
Court of Appeals
for the Ninth Circuit

TIDEWATER ASSOCIATED OIL COMPANY,
a corporation, Appellant,
vs.

NORTHWEST CASUALTY COMPANY, a corporation, Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

FILED

SEP 3 - 1958

PAUL P. O'BRIEN, CLERK

No. 16070

United States
Court of Appeals
for the Ninth Circuit

MAX ASUNCION TUGADE, Appellant,

vs.

RICHARD C. HOY, District Director, Immigration and Naturalization Service,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

LLOYD A. TASOFF,
ROBERT H. GREEN,

1212 Spring Arcade Building,
541 South Spring Street,
Los Angeles 13, California.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney,

NORMAN R. ATKINS,
Assistant United States Attorney,
600 Federal Building,
Los Angeles 12, California. [1]*

* Page numbers appearing at bottom of page of Original Transcript of Record.

In the District Court of the United States, Southern
District of California, Central Division

Civil No. 511-57-TC

MAX ASUNCION TUGADE, Plaintiff,

vs.

ALBERT DEL GUERCIO, as District Director
for the Los Angeles District, Immigration and
Naturalization Service, United States Depart-
ment of Justice, Defendant.

COMPLAINT—PETITION FOR REVIEW

To the Honorable Judges of the United States Dis-
trict Court for the Southern District of Cali-
fornia:

Plaintiff, by his attorney, Philip Barnett, for his
petition for review and complaint herein, respect-
fully shows to this Court and alleges:

I.

The United States District Court for the South-
ern District of California has jurisdiction of this
complaint under the provisions of Title 5, United
States Code, section 1009, Title 8, United States
Code, section 1329 and Title 28, United States
Code, section 2201, et seq.

II.

Plaintiff resides at 300 North Fremont, Apt. 5,
Los Angeles, California, within the Southern Dis-
trict of California. [2]

III.

The defendant, Albert Del Guercio, is the District Director of the Los Angeles District of the Immigration and Naturalization Service, and is the official who has final authority to issue and has issued a warrant directing plaintiff's deportation from the United States. The said defendant is vested with authority to execute the said order and warrant of deportation and to stay its execution.

IV.

The official residence of the defendant is at 458 So. Spring Street, Los Angeles, California, within the Southern District of California.

V.

Plaintiff, Max Asuncion Tugade, is a native and citizen of the Philippine Islands, who last entered the United States at Wilmington, California, on May 16, 1925, and was a permanent resident of the United States.

VI.

On or about September 10, 1953 the defendant herein caused to be instituted against plaintiff a deportation proceeding by the issuance and service of an immigration warrant for plaintiff's arrest.

VII.

The aforesaid warrant charged that plaintiff is subject to be taken into custody and deported pursuant to the provisions of section 241 (a) (11) of the Immigration and Nationality Act, in that, the plaintiff had been convicted of a law relating to

the illicit traffic in narcotic drugs: Possession of Heroin.

VIII.

Plaintiff was accorded a hearing pursuant to the aforesaid charge before a Special Inquiry Officer of the Immigration and Naturalization Service. In the course of the said hearing [3] plaintiff denied that he was subject to deportation on the charge lodged against him in the warrant of arrest.

IX.

The plaintiff was denied a fair hearing and denied his constitutional right to due process of law in that the evidence submitted against him was in the form of hearsay evidence, without the presentation of the persons and without the opportunity to cross examine the said persons.

X.

The finding of deportability is based on facts and conclusions of law not pertinent to this plaintiff.

XI.

That the finding of deportability was in violation of the provisions of section 242(2) of the Immigration and Nationality Act which expressly provides that no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

XII.

Plaintiff took exception to the finding of deportability predicated upon the evidence that plaintiff "entered" the United States as an alien and ap-

pealed from said finding to the Board of Immigration Appeals. The said Board dismissed plaintiff's appeal.

XIII.

Plaintiff has exhausted his administrative remedies.

XIV.

Defendant herein, pursuant to a final finding of deportability, has issued a warrant for plaintiff's deportation and has indicated that he is proceeding to execute the same by deporting plaintiff from the United States.

XV.

Wherefore, plaintiff prays for the following relief together with such other further relief which this Court may deem [4] just and proper.

1. Plaintiff prays that a temporary injunction issue restraining and enjoining the defendant from executing the outstanding order and warrant for his deportation pending the determination of this proceeding.

2. Plaintiff further prays that a permanent injunction be granted restraining and enjoining the defendant from executing the outstanding order and warrant for his deportation.

3. Plaintiff further prays that a declaratory judgment be made herein declaring the outstanding order and warrant for his deportation null, void and unenforceable.

/s/ PHILIP BARNETT,

Attorney for Plaintiff. [5]

[Endorsed]: Filed April 25, 1957.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Albert Del Guercio, District Director for the Los Angeles District, Immigration and Naturalization Service, and in answer to the complaint on file herein admits, denies and alleges as follows:

I.

Neither admits nor denies the allegations contained in paragraph I on the ground that said allegations are conclusions of law.

II.

Referring to the allegations contained in paragraph II, defendant has no knowledge or information on which to form a belief and on that ground denies said allegations. [6]

III.

Admits the allegations contained in paragraph III.

IV.

Admits the allegations contained in paragraph IV.

V.

Admits the allegations contained in paragraph V.

VI.

Referring to the allegations contained in paragraph VI, defendant admits that the defendant herein caused to be instituted against plaintiff a

deportation proceeding by the issuance and service of an immigration warrant for plaintiff's arrest, and further alleges that the warrant of arrest was issued September 4, 1953, and served on plaintiff herein on September 10, 1953.

VII.

Admits the allegations contained in paragraph VII.

VIII.

Referring to the allegations contained in paragraph VIII, defendant admits that plaintiff was accorded a hearing pursuant to the aforesaid charge before a Special Inquiry Officer of the Immigration and Naturalization Service. Each and every other allegation contained in paragraph VIII is denied.

IX.

Denies each and every allegation contained in paragraph IX.

X.

Denies each and every allegation contained in paragraph X.

XI.

Denies each and every allegation contained in paragraph XI.

XII.

Admits the allegations contained in paragraph XII.

XIII.

Admits the allegations contained in paragraph XIII. [7]

XIV.

Referring to the allegations contained in paragraph XIV, defendant admits that he has, pursuant to a final finding of deportability, issued a warrant for plaintiff's deportation. Each and every other allegation is denied, and it is further alleged that defendant will not remove the plaintiff from the jurisdiction of the Court during the pendency of the within action.

For A Further, Separate, First Affirmative Defense to Said Complaint, Defendant Alleges:

I.

The plaintiff has been accorded a full and fair hearing in conformity with law to determine his right to be and remain in the United States. There will be offered in evidence when this cause is tried a certified record of the Immigration and Naturalization Service, Department of Justice, relating to the plaintiff, containing the complete record of the deportation proceedings before the Immigration and Naturalization Service.

For A Further, Separate and Second Affirmative Defense to Said Complaint, Defendant Alleges:

I.

Plaintiff's complaint on file herein fails to state a claim upon which relief can be granted.

Wherefore, defendant prays for a judgment dismissing said complaint, denying the relief prayed

for herein, and for such other relief as to the Court seems just and proper in the premises. [8]

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

NORMAN R. ATKINS,
Assistant U. S. Attorney,

/s/ NORMAN R. ATKINS,
Attorneys for Defendant. [9]

Affidavit of Service by Mail Attached. [10]

[Endorsed]: Filed June 24, 1957.

[Title of District Court and Cause.]

ORDER FOR FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

This cause having come before the court for hearing upon the petition and complaint of Max Asuncion Tugade, filed April 25, 1957, for declaratory relief and review of the finding of deportability under Section 241(a)(11) of the Immigration and Nationality Act of 1952, as amended by Section 301(b) of the Narcotic Control Act [8 U.S.C. § 1251(a)(11)], made by the Immigration and Naturalization Service; and the cause having been heard and submitted for decision; and it appearing to the court that:

(1) plaintiff is an "alien" [Philippine Independence Act of 1934, 48 Stat. 456, 48 U.S.C. § 1238(a)(1); *Cabebe v. Acheson*, 183 F. 2d 795 (9th Cir. 1950)];

(2) since plaintiff was convicted of unlawful possession of narcotics, he is within a deportable class under 8 U.S.C. § 1251(a)(11); and

(3) in order that plaintiff may be deported under 8 U.S.C. § 1251(a)(11), it is not required that plaintiff have entered the United States as an alien [*Rabang v. Boyd*, 234 F. 2d 904, 905 (9th Cir. 1956), *aff'd*, 353 U.S. 427, 431-33 (1957); *cf.* [11] *Gonzales v. Barber*, 207 F. 2d 398, 401-2 (9th Cir. 1953), *aff'd*, 347 U.S. 637 (1954)].

Accordingly It Is Ordered that findings of fact, conclusions of law, and judgment are ordered in favor of defendant and against plaintiff, and the same will be lodged with the Clerk by the attorney for defendant, pursuant to local rule 7, within 10 days.

It Is Further Ordered that the Clerk this day shall serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause.

Dated January 21, 1958.

/s/ THURMOND CLARKE,

United States District Judge.

[Endorsed]: Filed January 21, 1958.

United States District Court, Southern District
of California, Central Division

Civil No. 511-57-TC

MAX ASUNCION TUGADE, Plaintiff,

vs.

ALBERT DEL GUERCIO, as District Director
for the Los Angeles District, Immigration and
Naturalization Service, United States Depart-
ment of Justice, Defendant.

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND JUDGMENT

The above-entitled matter having come on for trial on January 20, 1958, in the above entitled Court before the Honorable Thurmond Clarke, Judge presiding without a jury; plaintiff being represented by his attorney, Philip Barnett, and the defendant being represented by his attorneys, Laughlin E. Waters, United States Attorney, Richard A. Lavine and Norman R. Atkins, Assistant United States Attorneys, by Norman R. Atkins; and counsel for the parties hereto having stipulated that a certified record of the deportation proceedings relating to the plaintiff should be received in evidence, and the Court having received the same; and the Court having heard the arguments of counsel, and having taken the within cause under submission; the Court having reviewed the aforementioned [13] record of deportation proceedings

relating to the plaintiff and being further advised in the premises, now makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

Plaintiff resides in the City of Los Angeles, California, within the Southern District of California.

II.

Plaintiff was born in the Philippine Islands in 1903. Plaintiff entered the United States at Wilmington, California, on May 16, 1925.

III.

On July 29, 1953, the plaintiff was convicted in the Superior Court of Los Angeles, California, for the offense of possession of narcotics (heroin) in violation of Section 11500 of the Health and Safety Code of California.

IV.

A hearing in deportation was held on September 25, 1955, and on October 4, 1956; that the Special Inquiry Officer at said deportation hearing did, after hearing, find that plaintiff is subject to deportation on the ground that he was convicted at any time of a violation of any law or regulation relating to the illicit possession of narcotic drugs, under the provisions of Section 241(a)(11) of the Immigration & Nationality Act of 1952 [8 U.S.C.A. 1251(a)].

V.

Plaintiff is an alien, a native and citizen of the Philippine Islands.

Conclusions of Law

I.

This Court has jurisdiction of the within cause under the provisions of Section 10 of the Act of June 11, 1946 [Administrative [14] Procedures Act], 60 Stat. 243, 5 U.S.C.A. § 1009.

II.

That the Immigration officials who acted in connection with the deportation proceedings relating to plaintiff had jurisdiction and authority to act.

III.

There is reasonable, substantial and probative evidence to support the decision of deportability, the Order of Deportation, and the Warrant of Deportation outstanding against the plaintiff.

IV.

The deportation proceedings relating to the plaintiff were fair, in accordance with law, and were in accordance with the plaintiff's constitutional rights.

V.

Plaintiff is an alien, a native and citizen of the Philippine Islands.

VI.

Plaintiff having been convicted on July 29, 1953,

of the offense of possession of narcotics (heroin) in violation of Section 11500 of the Health and Safety Code of California, is within a deportable class pursuant to Section 241(a)(11) of the Immigration and Nationality Act of 1952, as amended.

VII.

Section 241(a)(11) of the Immigration and Nationality Act of 1952, as amended, does not require that an alien have entered the United States as an alien as a prerequisite to deportation; that whether plaintiff entered the United States as an alien or not is irrelevant to the issues of this case.

VIII.

The Order of Deportation outstanding against the plaintiff and the Warrant of Deportation based thereon are valid and the [15] plaintiff is deportable, pursuant to said Order and Warrant.

IX.

Judgment should be entered in favor of the defendant and against the plaintiff, denying the relief prayed for in plaintiff's complaint, and awarding to the defendant his costs incurred herein.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed:

1. That judgment is hereby entered in favor of the defendant and against the plaintiff, denying

the relief prayed for in plaintiff's complaint;

2. That the final Order of Deportation of the plaintiff herein by the Immigration and Naturalization Service is a valid order and is hereby affirmed;

3. That the defendant have his costs incurred herein in the sum of \$20.00 as and for a docket fee, pursuant to 28 U.S.C. 1923.

Dated: January 31, 1958.

/s/ THURMOND CLARKE,
United States District Judge.

Affidavit of Service by Mail Attached. [17].

[Endorsed]: Filed and Entered January 31, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes Now the plaintiff Max Asuncion Tugade and appeals to the Court of Appeals of the United States from the judgment and the whole thereof.

Dated: March 6, 1958.

LLOYD A. TASOFF and
ROBERT H. GREEN,
/s/ By ROBERT H. GREEN,
Attorneys for Plaintiff-
Appellant. [20]

Affidavit of Service by Mail Attached. [21]

[Endorsed]: Filed March 17, 1958.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To the Clerk of the United States District Court,
for the Southern District of California, Central
Division:

You Will Please Take Notice that the plaintiff
and appellant designates, in accordance with Rule
75 of the Rules of Civil Procedure, the following
as the record on appeal:

1. Complaint.
2. Answer.
3. Findings of Fact, Conclusions of Law and
Judgment.
4. Order for Findings of Fact, Conclusions of
Law and Judgment.
5. Notice of Appeal. [26]

The appellant is informed and believes that no
evidence was heard, adduced or taken at the trial
and there is no stenographic record to be included
within the record on appeal.

The appellant will rely upon the following points
for a reversal of the judgment:

- (a) The appellant did not enter the United States
as an alien, and is therefore not subject to depor-
tation.
- (b) At the time of the appellant's conviction

of the offense of possession of heroin under Section 11,500 of the Health and Safety Code of the State of California, that offense was not grounds for deportation; therefore, to deport the appellant following the amendment of the Immigration and Naturalization Act of 1942 is a violation of the appellant's constitutional rights, and specifically would violate the provisions of the Fifth, Eighth and Fourteenth Amendments of the Constitution of the United States.

(c) If the Philippine Independence Act of 1934 changed the status of the appellant from a citizen national to that of an alien, to therefore permit deportation for an offense committed under the laws of the State of California (which offense was not deportable when it was committed) would be a violation of the Constitution of the United States as applied to the appellant, and therefore void.

(d) To permit the appellant's deportation for an offense committed under the laws of the State of California which would not be a deportable offense at the time of its commission is a violation of the appellant's constitutional rights and a violation of due process of law under the Fifth and Fourteenth Amendments of the United States Constitution and, therefore, void.

(e) The United States District Court committed reversible error in (1) determining that the appellant is an alien, (2) determining that the appellant was deportable under the laws of the [27] United

States, (3) determining that the appellant entered the United States as an alien, and (4) ordering the appellant to be deported.

LLOYD A. TASOFF and
ROBERT H. GREEN,
/s/ By ROBERT H. GREEN,
Attorneys for Plaintiff and
Appellant. [28]

Affidavit of Service by Mail Attached. [29]

[Endorsed]: Filed June 16, 1958.

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL
PORTIONS OF THE RECORD

To the Clerk of the United States District Court,
for the Southern District of California, Central Division:

You Will Please Take Notice that the defendant and appellee designates, in accordance with Rule 75(a) of the Rules of Civil Procedure, the following as the record on appeal:

1. All of those portions of the record designated by plaintiff in his Designation of Contents of Record on Appeal filed herein.

2. In addition thereto, the certified Administrative Record of the Immigration and Naturalization Service relating to the plaintiff which was intro-

duced as a Government Exhibit in the trial of the said action. [30]

LAUGHLIN E. WATERS,

United States Attorney,

RICHARD A. LAVINE,

Assistant U. S. Attorney,

Chief of Civil Division,

NORMAN R. ATKINS,

Assistant U. S. Attorney,

/s/ NORMAN R. ATKINS,

Attorneys for Defendant and
Appellee. [31]

Affidavit of Service by Mail Attached. [32]

[Endorsed]: Filed June 20, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 32, inclusive, containing the original:

Petition for Review.

Answer.

Order for Findings of Fact, Conclusions of Law and Judgment.

Findings of Fact, Conclusions of Law and Judgment.

Substitution of Attorneys.

Notice of Appeal.

Affidavit for extension of time to file agreed Statement on Appeal.

Affidavit for extension of time to file record on Appeal and Order thereon.

Designation of Contents of Record on Appeal (Appellant).

Designation of Additional Portions of the Record (Appellee).

B. Administrative File of Immigration and Naturalization Service re Max Asuncion Tugade.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Dated: 6/30/58.

[Seal] JOHN A. CHILDRESS,
Clerk,

/s/ By WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16070. United States Court of Appeals for the Ninth Circuit. Max Asuncion Tugade, Appellant, vs. Richard C. Hoy, District Director, Immigration and Naturalization Service, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed and Docketed: July 1, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.



No. 16070

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

MAX ARNOLDSON TRADING

Appellant,

vs.

ROBERT C. HOY, District Director, Immigration and
Naturalization Service

Appellee.

APPELLANT'S OPENING BRIEF.

LEONARD A. TASOFF, and

VERNON H. GREEN,

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Attorneys for Appellant.

FILED

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UNITED STATES DISTRICT COURT

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No. 16070
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

MAX ASUNCION TUGADE,

Appellant,

vs.

RICHARD C. HOY, District Director, Immigration and
Naturalization Service,

Appellee.

APPELLANT'S OPENING BRIEF.

The appellant has appealed from a judgment of the United States District Court in favor of the appellee, Richard C. Hoy, District Director, Immigration and Naturalization Service. The appeal is from a judgment wherein the appellant was denied any relief following the filing of a petition wherein the appellant prayed that the appellee be restrained from executing an order for the appellant's deportation.

The plaintiff and appellant will be referred to herein as "appellant," and the defendant and appellee will be referred to as "appellee."

Statement of Facts.

The facts are simple. The appellant was born in the Philippine Islands in 1903, and entered the United States at Wilmington, California, on May 16, 1925. Since that time, he continually resided in the United States and was a permanent resident of the United States at all times

mentioned in these proceedings. On or about July 29, 1953, in the Superior Court of the State of California, in and for the County of Los Angeles, the appellant was convicted of a violation of Section 11500 of the Health and Safety Code of California (possession of a preparation of heroin, a narcotic). Thereafter, a deportation proceeding was commenced, and the appellant was ordered to be deported; but on June 11, 1954, the Board of Immigration Appeals ordered that the proceedings be terminated upon the grounds that the conviction did not constitute grounds of deportability under the provisions of Section 241(a)(11) of the Immigration and Nationality Act.

Thereafter, and on September 18, 1956, an Order to Show Cause was issued ordering the appellant to appear and show cause why he should not be deported from the United States because of the conviction hereinbefore referred to—that is, a violation of Section 11500 of the Health and Safety Code of California.

The latter deportation proceeding resulted in an Order of Deportation.

Thereafter, the Board of Immigration Appeals of the United States Department of Justice ordered that the appeal of the appellant be dismissed. Following the administrative remedies, the appellant filed a Petition for Review in the United States District Court praying that the appellee be enjoined from enforcing the Order of Deportation. The Order for the Findings of Fact, Conclusions of Law and Judgment and the Findings of Fact, Conclusions of Law and Judgment are found in the Transcript of the Record in this matter, pages 10 to 16.

Contentions on Appeal.

If the Philippine Independence Act of 1934 changed the status of the appellant from a citizen national to that of an alien, to therefore permit deportation for an offense committed under the laws of the State of California (which offense was not deportable when it was committed) it would be a violation of the Constitution of the United States as applied to the appellant, and therefore void.

The appellant will further rely for reversal of the judgment on the following points:

1. The Presidential Proclamation No. 2696 dated July 8, 1946, was a violation of and inconsistent with the supreme law of the land as stated in the Treaty of Paris of 1898:

2. The amendment of Section 241(a)(11) of the Immigration and Nationality Act effective on July 19, 1956, was prospective in its application, and not a basis for deportation of the appellant.

3. The appellant had a status of nondeportability which was saved in the saving clause of Section 405(a) of the Immigration and Nationality Act of 1952. Section 241, subdivision (d) of said act does not change the status of nondeportability.

4. If the Philippine Independence Act of 1934 changed the status of the appellant from a citizen national to that of an alien, to therefore permit deportation for an offense committed under the laws of the State of California (which offense was not deportable when it was committed) it would be a violation of the Constitution of the United States as applied to the appellant, would be a violation of the appellant's due process of law and his constitutional rights, and therefore void.

ARGUMENT.

I.

The Presidential Proclamation No. 2696 Was a Violation of the Treaty of Paris and Void.

By reason of the Treaty of Paris of 1898, Spain ceded the Philippine Islands to the United States (30 Stat. 1754). Article IX of the Treaty provided that "the civil rights and political status of the native inhabitants shall be determined by the Congress." (30 Stat. 1759.)

That Treaty, when adopted by the Congress, became the supreme law of the land. It could only be constitutionally modified, altered or changed.

Article 6, United States Constitution, provides in part as follows:

" . . . And all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

Pursuant to Article 9 of the Treaty of Paris, the Congress declared in the Act of July 1, 1902, that Philipppines born in the Islands after 1899 were to "be citizens of the Philippine Islands and, as such, entitled to the protection of the United States." (32 Stat. 691.)

The Philipppines, as nationals, owed an obligation of permanent allegiance to the United States.

The Philippine Independence Act of 1934, 48 U. S. C. A. 1244, stated the procedure by which complete independence of the Philippine Islands was to be accomplished. That Act was contingent upon action by the President of the United States.

The President of the United States, by Presidential Proclamation, caused the Act to become effective and self-

executing (Presidential Proclamation No. 2695, 60 Stat. 1352; Presidential Proclamation No. 2696, 60 Stat. 1353).

By so doing, the Presidential Proclamation was an unauthorized and unconstitutional exercise of legislative power and void.

Separately, the Presidential Proclamations hereinbefore referred to were inconsistent and without sanction, pursuant to the Treaty of Paris of 1898. The Treaty provided that the civil rights and political status of the native inhabitants shall be determined by the Congress. There is no authority, express or implied, found in the Treaty to authorize the President of the United States to change the political status of the "citizen nationals" permanently residing in the United States.

II.

The 1956 Amendment Did Not Furnish Any Grounds for Deportation of the Appellant.

Section 401 of the Act of July 18, 1956, Chapter 629, 70 Stat. 576, provided an amendment to Section 241(a)-(11) by adding illicit possession of narcotics to the other grounds of deportation found in such section. This section also amended other parts of the Federal Code, including Title 18, dealing with crimes and criminal procedure. There is no question but that the law could not be made retroactive and hence *ex post facto* with respect to the crimes and criminal procedure, and hence could not be separated to be made *ex post facto* with respect to deportation.

It is true that retroactive and *ex post facto* laws have been held by the Supreme Court not to be applicable to Immigration and Nationality laws. However, in this case, since the law covered criminal as well as quasi-criminal

procedures and was not expressly made retroactive, then the interpretation that must be placed upon this law is that it was purely prospective in its application. This is the only reasonable interpretation that can be placed upon the Act, and to allow conversely would do violence to all constitutional principles.

As stated in the case of *Del Guercio v. Gabot*, 161 F. 2d 559, 561:

“ . . . The law does not favor the retroactive application of statutes. Ex post facto application of criminal law is prohibited by the United States Constitution. Of course, the issue here is not concerned with the subject of ex post facto law, yet it approaches it in principle, for if the Director is right, the appellee is to be forceably deported only by the retrospective application of a law which has constituted a perfectly legal act, when done, a necessary element for the deportation.”

Del Guercio v. Gabot, 161 F. 2d 559, 561.

III.

The Appellant Had Achieved a Status of Nondeportability Insofar as the Conviction of Possession of Heroin Was Concerned.

Section 241(a)(11) of the Immigration and Nationality Act of 1952 did not include “possession” as one of the grounds for deportation. It also applied only to aliens, and not to nationals. The appellant was not deportable prior to that Act, nor at the time of the enactment of that Act. The Government alleges that he became deportable by reason of the 1956 amendment. Under the Immigration and Nationality Act of 1952, this status of nondeportability was preserved to him by the savings clause of Section 405(a) of that Act. It has been stated that Sec-

tion 241(d) specifically provides for deportation of an alien, notwithstanding that the offense for which he is being deported occurred prior to the 1952 Act. It is suggested that Section 241(d) relates to cases of deportation appearing in Section 241(a), where entry was a factor, since it specifically refers to entry.

If that be so, then Section 241(d) would not cover the case of deportability attributed to the appellant. That, hence, the savings clause of nondeportability under Section 405(a) of the 1952 Act would apply, making the appellant nondeportable.

Conclusion.

An examination of the entire record reveals a gross miscarriage of justice. The laws governing deportation were never intended to apply to citizen nationals of the United States. The appellant had achieved a status of nondeportability, and upon that ground and the others heretofore stated the judgment should be reversed.

Respectfully submitted,

LLOYD A. TASOFF and

ROBERT H. GREEN,

Attorneys for Appellant.

No. 16070

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MAX ASUNCION TUGADE,

Appellant,

vs.

RICHARD C. HOY, District Director, Immigration and
Naturalization Service,

Appellee.

APPELLEE'S OPENING BRIEF.

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No. 16070

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MAX ASUNCION TUGADE,

Appellant,

vs.

RICHARD C. HOY, District Director, Immigration and
Naturalization Service,

Appellee.

APPELLEE'S OPENING BRIEF.

Jurisdiction.

Appellee, plaintiff below, brought an action in the District Court seeking judicial review of an order of deportation [R. 3-6].¹ Jurisdiction there was invoked pursuant to 28 U. S. C. 2201 (the Declaratory Judgment Act) and 5 U. S. C. 1009 (Sec. 10 of the Administrative Procedures Act).

The judgment of the District Court [R. 15] was a final decision; hence the jurisdiction of this Court, if any, would be found in 28 U. S. C. Sections 1291 and 1294(1).

¹"R." refers to the printed Transcript of Record.

Statement of Case.

Appellant's recitation under the heading "Statement of Facts" in his brief is adequate for the purpose of this appeal and appellee therefore adopts it.

Statement of Points.

Appellant has not stated whether or where the court below erred but, if and when such allegation is ever made by positive specification, appellee's position will be that the District Court correctly applied the law.

Questions Presented.

As appellee understands it, appellant has raised the following issues of law in this appeal:

1. Were Presidential Proclamations Nos. 2695 and 2696, 60 Stat. 1352, 1353, void because of an unconstitutional delegation of legislative power by Congress in the Philippine Independence Act of 1934 (48 U. S. C. 1244)?

2. Was Section 241(a)(11) of the Immigration and Nationality Act, as amended, intended to be applied prospectively and applied retroactively insofar as appellant is concerned?

3. Did appellant have a status of nondeportability preserved by the savings clause of Section 405(a) of the Immigration and Nationality Act of 1952, which was not disturbed by Section 241(d) of that Act?

4. Was appellant not deportable because he was not an "alien" or, if in 1952 he was an alien, would Section 241(a)(11) of the Immigration Act not apply to him because he did not "enter" the United States as an alien?

Statutes Involved.

Title 8, U. S. C., 1251(a) (Sec. 241(a) of the Immigration and Nationality Act of 1952), insofar as pertinent, reads:

“Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who . . .” (66 Stat. 204; enacted June 27, 1952.)

Title 8, U. S. C. 1251(a)(11) was amended by Section 301(b), Public Law 728, 70 Stat. 575, July 18, 1956, to read as follows:

“(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, *or a conspiracy to violate*, any law or regulation relating to the illicit possession of *or* traffic in narcotic drugs, or who has been convicted of a violation of, *or a conspiracy to violate*, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate;” (The italicized words are the words added by amendment in Public Law 728; otherwise the section reads as when it was enacted as part of 8 U. S. C. 1251(a) on June 27, 1952.)

ARGUMENT.

I.

Appellant Has No Standing to Challenge the Constitutionality of Presidential Proclamations Nos. 2695 and 2696.

Appellant, in his brief, has alleged that Presidential Proclamations Nos. 2695 and 2696 (60 Stat. 1352, 1353), authorized by the Philippine Independence Act of 1934 (48 U. S. C. 1244), were “. . . unauthorized and unconstitutional exercise[s] of legislative power and void.” This issue is raised for the first time on appeal. Nowhere in the record below [viz., Complaint, R. 3-6; Order for Findings of Fact, Conclusions of Law and Judgment, R. 10-11; Findings of Fact, Conclusions of Law and Judgment, R. 12-16] is there any mention that these Presidential Proclamations are or are not constitutional.

It is a fundamental tenet of constitutional law that one who challenges the constitutionality of either a statute or an executive order authorized by legislation must state with particularity the grounds for the allegation. These grounds must be raised in the lower court and not for the first time on appeal. Furthermore, if the case can be disposed of on any other grounds than a finding of unconstitutionality, the case must be thus resolved. But in any event, a statute or executive proclamation must not be held unconstitutional “. . . on the mere assertion of appellant without any argument or reason.” (*Ramsey v. United States*, 245 F. 2d 295, 297 (C. A. 9, 1957).) And obviously this appeal can be disposed of on nonconstitutional grounds, viz., even if this Court grants the relief requested by appellant it can do so without examining the constitutional merits of Presidential Proclamations Nos. 2695 and 2696.

II.

Appellant Had No Status of Nondeportability Immunizing Him From Deportation Under Section 241(a)(11) of the Immigration and Nationality Act of 1952.

Appellant argues that Section 405(a) of the Immigration and Nationality Act exempts him from deportation under Section 241(a)(11) of that Act. Like his argument that the Presidential Proclamations, *supra*, were unconstitutional, this argument is raised for the first time on appeal. Nothing in the Transcript of Record before this Court indicates that the court below made any ruling whatsoever regarding appellant's rights, if any, under Section 405(a). The record further indicates that appellant at no time sought a ruling from the court below regarding any rights or status he might have under that section. Although the point will be argued, it is done only out of an abundance of caution and not with an intent to abandon the Government's position that appellant's failure to raise the point below precludes him from raising the point now for the first time.

Not only is the assertion that appellant was nondeportable under Section 405(a) raised for the first time in this Court, it is alleged in an ambiguous and unintelligible manner. Appellant merely states that “. . . this status of nondeportability was preserved to him by the savings clause of Section 405(a) . . .” (Appellant's Br. p. 6). The precise wording or provisions of Section 405(a) that allegedly apply to appellant are not cited, contrary to Rule 18(2)(e) of this Court.

Appellant's argument or assertion that he is undeportable by virtue of the savings clause of Section 405(a) is not clarified by any explanation or citation of authorities.

However, if appellee understands appellant correctly, his argument is that, inasmuch as he did not “enter” the United States in 1925 as an alien, he cannot now be deported “on grounds for which entry as an alien is required.” Appellant here apparently is relying on those cases² culminating in *Gonzales v. Barber*, 347 U. S. 637 (1954), holding in effect that deportation statutes expressly requiring “entry” as an alien do not apply to aliens who did not enter the United States in that status.

Before proceeding further, it seems advisable to clarify one point, namely, appellant, a Filipino permanently residing in the United States, is and has been since July 4, 1946, an alien. This Court has previously at great length explained how Filipinos permanently residing in the United States as nationals became, by virtue of the Independence Act of 1934 and the subsequent Presidential Proclamations, on July 4, 1946, aliens (*i.e.*, no longer nationals) of the United States. (*Cabebe v. Acheson*, 183 F. 2d 795 (1950).) Any question regarding the efficacy of the *Cabebe* decision was fully resolved in the case of *Rabang v. Boyd*, 353 U. S. 427, 340-341 (1957). Having lost his status as a “national” of the United States, appellant presumably could have applied, under the provisions of 8 U. S. C. 1437, to become a naturalized citizen of the United States. But having failed to do so, he is and must be considered, for the purposes of this appeal, an alien.

Turning now to what may be appellant’s position that he is not deportable because he did not “enter” the United States as an alien, it is submitted that that argument has been conclusively resolved adversely to him by virtue of

²Such cases in this Circuit include *Del Guercio v. Gabot*, 161 F. 2d 559 (1947); *Mangaoang v. Boyd*, 205 F. 2d 553 (1953), and *Gonzales v. Barber*, 207 F. 2d 398 (1953).

Rabang v. Boyd, 335 U. S. 427. That case involved deportation of a Philippine alien much in appellant's present position. There deportation was sought of Rabang in 1951 for conviction of a narcotics offense under the Immigration Act of 1931, 46 Stat. 1171, as amended, 54 Stat. 673. This Court, in 234 F. 2d 904 (in 1956), affirmed the District Court's decision that Rabang was deportable. Rabang appealed to the United States Supreme Court, arguing that the case of *Barber v. Gonzales*, 347 U. S. 637, was determinative on the question of "entry." The Supreme Court pointed out that the *Gonzales* and the *Rabang* cases differed in that, in the first case Section 19(a) of the Immigration Act of 1917 (39 Stat. 889) controlled because it specifically referred to deportable acts "committed . . . after entry," whereas in *Rabang*, the Supreme Court stated "[b]ut the 1931 Act differs from the 1917 Act because it is silent as to whether 'entry' from a foreign country is a condition of deportability. . . . It follows that the holding in *Gonzales* is not applicable." (*Rabang v. Boyd*, op. cit. at p. 431.) The Supreme Court also rejected Rabang's argument that the requirement of "entry" was implicit in the 1931 Act, at page 432. Although the instant case concerns the 1952 Act rather than the 1931 Act, the *Rabang* rationale that Congressional silence on the "entry" requirement for the deportation of an alien in appellant's position should be equally controlling. "Entry" as an alien is not a condition for the deportation of an alien convicted of possessing "narcotic drugs." (Sec. 241(a)(11).)

It appears that appellant concedes the applicability of the *Rabang* case to his situation, unless appellee misunderstands his suggestion ". . . that Section 241(d) relates to cases of deportation appearing in Section 241(a) where

entry was a factor, since it specifically refers to entry.” (App. Br. p. 7.) Why appellant should make this suggestion without argument, when Section 241(d) (8 U. S. C. 1251(d)) states that “except as otherwise *specifically provided* in this section, provisions of this section shall be applicable to *all* aliens belonging to *any of the classes* enumerated in subsection (a) (*i.e.*, 241(a)) (emphasis ours),” mystifies appellee. Furthermore, appellee, after careful examination of Section 405(a), despite ignorance of the specific provision therein that appellant relies on, is unable to see that it even applies to him, much less negates the express provisions of Section 241(d).

III.

The July 18, 1956 Amendment (70 Stat. 576) to Section 241(a)(1) of the Immigration and Nationality Act Was Not Ex Post Facto Law.

Appellant argues (App. Br. pp. 5-6) that the amendment to Section 241(a)(1) of the Immigration and Nationality Act of 1956 is or amounts to an *ex post facto* law applied retroactively to appellant who should therefore be relieved from its burdens. Like his constitutionality and “savings clause of immunity from deportation despite Section 241(d)” arguments, this argument is raised for the first time on appeal, without a shred of support in the record. Again, from an abundance of caution, appellee will answer this unsupported and unargued assertion of appellant without waiving his insistence that this Court should rule the question moot for failure to raise it below.

Appellant states, “It is true that retroactive and *ex post facto* laws have been held by the Supreme Court not to be applicable to immigration and nationality laws.” (App. Br. p. 5.) Appellee assumes that appellant refers to such

cases as *Harisiades v. Shaughnessy*, 342 U. S. 580, 594 (1951), and *United States v. Sahli*, 216 F. 2d 33, 40-41 (C. A. 7, 1954), which hold that such laws are neither retroactive nor *ex post facto*. Hence, appellee is unable to understand appellant's unsupported assertion that "There is no question but that the law could not be made retroactive and hence *ex post facto* with respect to the crimes and criminal procedures, and hence could not be separated to be made *ex post facto* with respect to deportation." (App. Br. p. 5.)

Apparently, appellant also complains that Section 241-(a)(11), as amended, cannot apply to him because it "... was not expressly made retroactive. . . ." (App. Br. p. 6.) However, this assertion ignores the explicit wording of Section 241(a)(11), as amended, that one "... who *at any time* has been convicted of a violation of . . . any law . . . relating to the illicit possession of . . . narcotic drugs. . . ." (Emphasis ours.) This assertion also ignores the provision of Section 241(d) in that aliens deportable under Section 241(a) shall not be exempt from deportation by virtue of "... (2) . . . facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a) of the Section (viz. 241(a)) occurred prior to June 27, 1952." If appellant is not immune from deportation for acts occurring prior to June 27, 1952, it is difficult to see why he is immune for a deportable act occurring on July 29, 1953.

Appellant has cited the case of *Del Guercio v. Gabot*, 161 F. 2d 559 (C. A. 9, 1947) (App. Br. p. 6), for the proposition that application of legislation with an *ex post facto* flavor should not be condoned. Appellant quotes the

following extract from that case in support of his proposition:

“... The law does not favor the retroactive application of statutes. *Ex post facto* application of criminal law is prohibited by the United States Constitution. Of course, the issue here is not concerned with the subject of *ex post facto* law, yet it approaches it in principle, for if the Director is right, the appellee is to be forceably deported only by the retrospective application of a law which has constituted a perfectly legal act, when done, a necessary element for the deportation.”

Del Guercio v. Gabot, op. cit. at p. 561.

However, the quotation from the *Gabot* case is inapplicable to the instant case in many respects. First of all, the quotation is *obiter dicta*. It was not necessary to the actual holding of the *Gabot* case, namely, that *Gabot* was not an alien so that his otherwise deportable act did not apply (at p. 561). Secondly, the “perfectly legal act,” which the *Gabot* act refers to, was not a deportable act but a 1934 reentry into the United States after a four-hour sojourn in Mexico. That act, the Government argued unavailingly, made *Gabot* in legal contemplation an alien. In the instant case, appellant has been an alien since July 4, 1946, well before his deportable conviction in 1953 arose.

Hence, it is submitted that appellant has been ordered deported under a law that is neither *ex post facto* nor made retroactive without the express consent of Congress.

Conclusion.

In conclusion, appellee respectfully submits to this Honorable Court:

(1) That the points appellant has raised on this appeal were not raised below and hence he has waived any right to have them reviewed here.

(2) That in any event the points raised amount to ambiguous assertions, without any authority to support them.

(3) That all of appellant's points are without any merit whatsoever; and hence, for all or any of these reasons, the judgment appealed from below should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

HENRY P. JOHNSON,
Assistant U. S. Attorney,
Attorneys for Appellee.

No. 16072 ✓

United States
Court of Appeals
for the Ninth Circuit

TIDEWATER ASSOCIATED OIL COMPANY,
a corporation, Appellant,

vs.

NORTHWEST CASUALTY COMPANY, a cor-
poration, Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

FILED

SEP 3 - 1958

PAUL P. O'BRIEN, CLERK

No. 16072

United States
Court of Appeals
for the Ninth Circuit

TIDEWATER ASSOCIATED OIL COMPANY,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

WHEELOCK, RICHARDSON & NIEHAUS,
C. R. RICHARDSON,
Corbett Building,
Portland 4, Oregon,
For Appellant.

PHILLIPS & SANDEBERG,
WM. C. RALSTON,
W. K. PHILLIPS,
Public Service Building,
Portland 4, Oregon,

LEO LEVENSON,
314 Portland Trust Building,
Portland 4, Oregon,
For Appellee.

In The Circuit Court of the State of Oregon
For The County of Multnomah

No. 239,354

TIDEWATER ASSOCIATED OIL COMPANY,
a Delaware corporation, Plaintiff,

vs.

NORTHWEST CASUALTY COMPANY, a Wash-
ington corporation, Defendant.

COMPLAINT

Plaintiff complains, and for cause of action
against the defendant, alleges:

I.

That at all times herein mentioned, Tidewater Associated Oil Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware and licensed to carry on a gasoline and oil distributing business within the State of Oregon. That at all times herein mentioned Northwest Casualty Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Washington and licensed to carry on a general insurance business within the State of Oregon.

II.

That on or about the 9th day of January, 1953, defendant, Northwest Casualty Company of Seattle, Washington, in consideration of a premium

and policy fee in the sum of \$174.04, wrote, issued and delivered a certain comprehensive public liability Policy No. 880-7277, wherein Plaintiff was an additional named insured and wherein defendant agreed to pay on behalf of insured all sums which Plaintiff would be obligated to pay by reason of liability imposed upon Plaintiff by law for damages because of bodily injury not to exceed \$25,000.00 for each person and \$50,000.00 for each occurrence. That said policy was in full force and effect at all times herein mentioned.

III.

That on the 12th day of September, 1955, there was served upon Plaintiff a summons and complaint entitled "Ruth Buffington, Plaintiff, vs. Wm. V. Sherer, Frank Moore, Jr., and Tidewater Associated Oil Company, a corporation, Defendants", being Case No. 19175 in the Circuit Court of the State of Oregon in and for the County of Coos, copy of which is attached hereto, marked Exhibit A. and by this reference made a part and parcel hereof.

IV.

That on or about January 25, 1956, Plaintiff by letter tendered the defense of said action to defendant under and in accordance with the terms of said policy of insurance hereinabove referred. That in reply to said letter, defendant, by letter dated January 27, 1956, denied liability under said policy, which said letter is attached hereto, marked Exhibit B and by this reference made a part and

parcel hereof. That by reason thereof, Plaintiff was required to, and did procure counsel to defend said action, and because of plaintiff's inability to defend under the acts of negligence set forth in said complaint, on advice of counsel did fully compromise and settle said action on the 28th day of June, 1956, by paying to the Plaintiff therein, Ruth Buffington and her husband, Robert Buffington, the full sum of \$15,000.00 which Plaintiff herein alleges to be a reasonable, fair and necessary sum for the settlement thereof.

V.

That by reason of the refusal of defendant to accept liability in accordance with the terms of said policy, plaintiff has been damaged in the sum of \$15,000.00.

VI.

That more than six months has elapsed since the date of the tender of said above mentioned action to defendant and a reasonable attorney's fee to be allowed herein would be the sum of \$3,500.00.

For a Second Cause of Action, Plaintiff alleges:

I.

Realleges Paragraphs I, II and III of its first cause of action and by this reference incorporates the same herein as though fully set forth hereinafter.

II.

That on or about January 25, 1956, plaintiff, by letter, tendered to defendant the defense of said

action hereinabove referred in accordance with the terms of said policy of insurance referred to above. That in reply to said letter defendant, by letter dated January 27, 1956, attached hereto marked Exhibit B and by this reference made a part and parcel hereof, refused to defend said action. That by reason thereof, plaintiff was required to, and did, procure counsel to defend said action and plaintiff was obligated to, and did, pay all costs incurred in said action amounting to \$260.73, together with a reasonable fee for its attorneys in the sum of \$750.00, to plaintiff's damage in the sum of \$1010.73.

III.

That more than six months has elapsed since the date of this tender of said above mentioned action to defend and a reasonable attorney's fee to be allowed herein would be the sum of \$700.00.

Wherefore, Plaintiff prays for judgment against defendant in the sum of \$15,000.00 on its first cause of action, together with the sum of \$3500.00 as and for a reasonable attorney's fee herein; and on its second cause of action, for the sum of \$1010.73, together with the sum of \$700.00 as and for a reasonable attorney's fee herein; together with Plaintiff's costs and disbursements in this cause incurred.

WHEELOCK & RICHARDSON,
Attorneys for Plaintiff.

EXHIBIT "A"

In The Circuit Court of the State of Oregon
In and For The County of Coos.

Case No. 19175

RUTH BUFFINGTON, Plaintiff,

vs.

WM. V. SHERER, FRANK MOORE, JR., and
TIDE WATER ASSOCIATED OIL COM-
PANY, a corporation, Defendants.

Action at Law

COMPLAINT

Comes now the Plaintiff above named and for her first cause of action against the Defendants above named complains and alleges as follows:

I.

That the Defendant Tide Water Associated Oil Company is a corporation duly organized and existing under the laws of the State of Delaware, and licensed to do business in the State of Oregon.

II.

That at all times in this Complaint mentioned, the Defendants were engaged in the sale, delivery, and distribution of gasoline, stove oil and other petroleum products in Bandon, Coos County, Oregon, and the vicinity thereof.

Exhibit "A"—(Continued)

III.

That at all times in Plaintiff's Complaint mentioned, the Defendants Wm. V. Sherer and Frank Moore, Jr., were the agents, servants and employes of the Defendant Tide Water Associated Oil Company, a corporation, and at all times in this Complaint mentioned were acting within the due course and scope of their employment as such agents, servants and employes.

IV.

That on or about the 3rd day of December, 1953, and for some time prior thereto, Plaintiff, together with her husband and three children, maintained a residence near Bandon in Coos County, Oregon, and as a part of the furnishings in said home had installed and in use therein an oil heating stove for the living room area of said house, and a wood cooking stove for cooking purposes located in the kitchen of said house; that in order to furnish fuel to said oil heating stove a small pipe ran from said heating stove to a tank located outside said house in which stove oil was stored, and which stove oil ran from said tank into the said heating stove when required to maintain a fire therein.

V.

That as a part of Plaintiff's normal and regular household duties she was required to start a fire in the kitchen stove heretofore mentioned, and in connection therewith kept a can for the sole and ex-

Exhibit "A"—(Continued)

clusive purpose of keeping therein a small quantity of stove oil, a small amount of which stove oil Plaintiff would pour upon the stove wood located in the fire box of said stove to facilitate the starting of a fire therein.

VI.

That on or about the 1st day of December, 1953, an order was placed with the Defendant Tide Water Associated Oil Company for the delivery to the Plaintiff's home, stove oil of the kind normally and usually used in an oil heating stove, and with a flash point of approximately 150° Fahrenheit; that on or about the 2nd day of December, 1953, Defendant Frank Moore, Jr., drove to Plaintiff's home for the purpose of delivering thereto stove oil as had been previously ordered from the Defendant Tide Water Associated Oil Company; that the truck in which said stove oil was delivered had attached thereto as a part thereof a tank divided into compartments; one such compartment contained stove oil; other compartments of said tank contained highly explosive and inflammable petroleum products normally and customarily termed regular gasoline and ethyl gasoline.

VII.

That upon the arrival of said Defendant Frank Moore, Jr., Plaintiff obtained the can heretofore mentioned and requested said Defendant Frank Moore, Jr., to place a small quantity of stove oil, as ordered, therein, and that she desired to use

Exhibit "A"—(Continued)

the same to facilitate the starting of kitchen stove fires. Thereupon, said Defendants took the hose located upon said truck and poured a petroleum product represented by said Defendants to be stove oil, as ordered, in said can. Thereupon, Plaintiff placed said can and said contents as placed therein by Defendants, upon the back porch of her home for later use in starting kitchen stove fires.

VIII.

That on or about the hour of 8:00 o'clock A.M. on the 3rd day of December, 1953, the Plaintiff was required to start a fire in the wood stove hereinbefore mentioned, placed some wood therein, obtained the can which contained only the petroleum product delivered by Defendants as hereinbefore mentioned, and which Plaintiff had placed on the back porch, and which had been represented to her as containing stove oil, struck a match and placed the same beneath the wood at the end of the fire box farthest from the front of the stove, and commenced to pour a small quantity of the petroleum product from said can upon the wood at the front end of the fire box of the stove; that simultaneously, with the first small particle of the petroleum product coming in contact with the wood at the front end of the fire box of said stove, the petroleum product from said can ignited and flamed with great force and violence, and the flame therefrom simultaneously travelled up and into the can held by the Plaintiff thereupon, the contents of the can

Exhibit "A"—(Continued)

which had been delivered by Defendants and represented as stove oil, exploded with great force and violence, the force of said explosion propelling said can against Plaintiff's chest and the impact therefrom hurled the Plaintiff backwards for several feet and knocked her to the kitchen floor; and thereupon, fire from the petroleum product in said can, and which had been delivered by Defendants and represented as stove oil, almost completely enveloped Plaintiff with great fury and with intense heat, and thereby causing Plaintiff to be severely burned and to sustain injuries as hereinbefore set forth.

IX.

That Plaintiff's injuries heretofore mentioned and as hereinafter set forth were proximately caused by the carelessness and negligence of the Defendants, in the following particulars, to-wit:

(a) In furnishing to Plaintiff a petroleum product other than stove oil, or in furnishing another petroleum product mixed with stove oil, either of which when used for the purpose for which the Defendants knew it was going to be used, was highly explosive and would ignite with great fury and violence, was extremely dangerous and under no circumstances adaptable for the use for which Plaintiff desired said petroleum product, all of which was known to the Defendants, or with reasonable care and caution should have been known to the Defendants.

(b) That Defendants pumped from the only hose

Exhibit "A"—(Continued)

located on the truck used in the delivery of said petroleum product and into plaintiff's can a petroleum product which Defendants represented to be stove oil, when Defendants had immediately prior thereto pumped through the same hose gasoline, and when said Defendants knew, or in the exercise of reasonable care should have known, that said hose still contained gasoline and that said gasoline would be the first petroleum product to go into said can from said hose, and when used for the purpose for which Plaintiff intended to use the same, whether entirely gasoline or a mixture of gasoline and stove oil would constitute a highly explosive and dangerous material not suited or intended for the use contemplated by Plaintiff, and likely to cause serious injury to Plaintiff.

(c) In failing to pump a sufficient quantity of petroleum product into the stove oil storage tank, thereby removing all trace of gasoline from said hose, and thereby eliminating the possibility that said hose contained any gasoline prior to placing any stove oil in the can for Plaintiff.

(d) In failing to have and maintain upon said truck a separate hose to be used exclusively for stove oil, and thereby preventing a highly combustible, explosive, inflammable and dangerous product such as gasoline, or a highly combustible, explosive, inflammable and dangerous product such as a mixture of gasoline and stove oil, being delivered to a person for the purpose of facilitating the starting of kitchen stove fires, and particularly,

Exhibit "A"—(Continued)

to this Plaintiff when the same was represented to her to be entirely stove oil.

X.

That as a proximate result of the negligence of the Defendants as hereinbefore alleged, Plaintiff sustained third degree burns to her right hand, right forearm, posterior aspects of the waist, buttocks, thighs and legs, which required that Plaintiff be confined in a hospital from the 3rd day of December, 1953, continuously until the 3rd day of April, 1954; that Plaintiff has suffered great pain and mental anguish as a result of said injuries; that Plaintiff was required to receive frequent blood transfusions, as well as intravenous plasma and serum albumen; that during the time of Plaintiff's hospitalization she was required to undergo four separate skin grafting operations to cover the burned area; that by reason of said burns she has a kaloid formation over the right hip, right groin and on the dorsum of the right hand and wrist; that Plaintiff will be required to undergo further reconstructive surgery on her right hand to alleviate the limited motion thereof by reason of said burns; that Plaintiff has sustained a permanent limitation of the movement of the right hand and wrist and a weakening condition of the right hand, which will prevent her from having a normal use thereof. The scarring of the Plaintiff's body by said burns in the areas heretofore described are permanent and Plaintiff will be severely scarred

Exhibit "A"—(Continued)

for the remainder of her life; that by reason of said injuries Plaintiff has been generally damaged in the sum of \$100,000.00.

XI.

That as a proximate result of the negligence of the Defendants and the resulting injuries as hereinbefore alleged by Plaintiff, Plaintiff has incurred hospital bills in the sum of \$3,199.00 and doctor bills in the sum of \$600.00.

Plaintiff, for her second cause of action against Defendants complains and alleges as follows:

I.

Re-alleges Paragraphs numbered I, II, III, IV, and V of Plaintiff's first cause of action, as if specifically set forth herein.

II.

That upon the arrival of the Defendant Frank Moore, Jr. Plaintiff obtained the can heretofore mentioned and advised said Defendants that she required a small portion of the stove oil purchased for the purpose of facilitating the starting of kitchen stove fire, and thereupon, said Defendants took the hose located upon said truck, poured into said can the petroleum product which was represented by the said Defendants to be stove oil, and with a flash point of approximately 150° Fahrenheit; thereupon, Plaintiff placed said can and con-

Exhibit "A"—(Continued)

tents upon the back porch of her home, for later use for starting kitchen stove fires.

III.

That at the time of the purchase of the petroleum product, a portion of which was placed in the can at the request of the Plaintiff, the Defendants represented and impliedly warranted that the product placed in said can was stove oil, and was fit, safe and proper for the use which Plaintiff intended to employ said petroleum product, and Plaintiff relied upon the implied warranty of the Defendants that the said petroleum product was stove oil and that it was fit for the purpose for which she intended to employ the same, and had no notice that it was otherwise; however, at or about the hour of 8:00 o'clock A.M. on the 3rd day of December, 1953, Plaintiff was required to start a fire in the wood stove heretofore mentioned, placed some wood therein, obtained the can containing the same contents heretofore mentioned, from the back porch, which she believed and which had been represented to her as containing stove oil, and which Defendants impliedly warranted was safe and fit for the use to which she intended to employ it, struck a match and placed the same beneath the wood within and at one end of the fire box of the said kitchen stove, and commenced to pour a small quantity of the said petroleum product from said can upon the wood at the other end of said fire box; that simultaneously, with the first small par-

Exhibit "A"—(Continued)

tie of the petroleum product from the said can coming into contact with the said wood, the petroleum product from said can ignited and flamed with great force and violence, and the flame therefrom instantaneously traveled up and into the can held by Plaintiff, thereupon, a violent explosion occurred and said can was thrown with great force and violence by said explosion against Plaintiff's chest, the impact therefrom hurling Plaintiff backwards for several feet and knocking her to the kitchen floor; thereupon, fire from the petroleum product in said can almost completely enveloped the Plaintiff with great fury and with intense heat, thereby causing Plaintiff to be severely burned and to sustain the injuries hereinafter set forth.

IV.

That the petroleum product sold by Defendants a portion of which was delivered into the can at the request of Plaintiff, and which Defendants impliedly warranted to be stove oil and safe and fit for the use for which Plaintiff intended to employ said petroleum product, was not stove oil, but gasoline, or a mixture of gasoline and stove oil, extremely dangerous, highly explosive and under no circumstances fit for or adaptable to the use for which Plaintiff desired to use the same, all of which was known to the Defendants, or with reasonable care and caution should have been known to the Defendants.

Exhibit "A"—(Continued)

V.

That by reason of the facts as heretofore alleged, the implied warranty to Plaintiff by Defendants was breached, and as a result thereof Plaintiff sustained third degree burns to her right hand, right forearm, posterior aspects of the waist, buttocks, thighs and legs, which required that Plaintiff be confined in a hospital from the 3rd day of December, 1953, continuously until the 3rd day of April, 1954; that Plaintiff has suffered great pain and mental anguish as a result of said injuries; that Plaintiff has required to receive frequent blood transfusions, as well as intravenous plasma and serum albumen; that during the time of Plaintiff's hospitalization, she was required to undergo four separate skin grafting operations to cover the burned area; that by reason of said burns, she has a keloid formation upon the right hip, right groin and upon the dorsum of the right hand and wrist, that Plaintiff will be required to undergo further reconstructive surgery on the right hand to alleviate the limited motion thereof by reason of said burns; that Plaintiff has sustained a permanent weakness and a permanent limitation of the movement of the right hand and wrist and the scarring of Plaintiff's body by said burns in the areas heretofore described are permanent and Plaintiff will be severely scarred for the remainder of her life, all to Plaintiff's damage in the amount of \$100,000.00.

Exhibit "A"—(Continued)

VI.

That by reason of the facts heretofore alleged, the implied warranty of the Defendants to Plaintiff was breached, and as a result thereof Plaintiff has incurred hospital bills in the sum of \$3,199.00, and doctor bills to date in the sum of \$600.00 all to Plaintiff's damage in the further sum of \$3,-799.00.

Wherefore, Plaintiff demands judgment against the Defendants, and each of them, in the sum of \$100,000.00 general damages and the further sum of \$3,799.00, special damages, and for Plaintiff's costs and disbursements incurred herein.

BEDINGFIELD, GRANT &
BEDINGFIELD,
By D. J. GRANT, JR.,
Of Attorneys for Plaintiff.

[Title of Circuit Court and Cause.]

SUMMONS

To: Wm. V. Sherer, Frank Moore, Jr. and Tide
Water Associated Oil Company, a corporation,

In the Name of the State of Oregon: You are hereby required to appear and answer the Complaint filed against you in the above entitled action within ten days from the date of service of this summons upon you, if served within this county; or if served within any other County of this State,

Exhibit "A"—(Continued)

then within twenty days from the date of the service of this Summons upon you; or if served outside the State of Oregon but within the United States, then within four weeks from the date of the service of this Summons upon you; or if served outside of the United States and within a territory of the United States then within six weeks from the date of the service of this Summons upon you and if you fail so to answer, for want thereof the Plaintiff will take judgment against you in the sum of \$100,000.00 general damages and the further sum of \$3,799.00 special damages.

BEDINGFIELD, GRANT &
BEDINGFIELD,
By D. J. GRANT,
Attorneys for Plaintiff.

EXHIBIT "B"

Airmail (Copy)

Northwestern Mutual Insurance Company
Incorporated 1901
Seattle, Washington

January 27, 1956

Oregon Claim Department, 234 Pacific Building,
Portland, Oregon, CA. 8-9554. F. H. Stuckrath,
Manager.

Tide Water Associated Oil Company
79 New Montgomery Street
San Francisco 20, California

Att: Mr. A. D. Williams

Re: Policy #880-7277, William V. Sherer, Insured. Loss 12/3/53. Your file: 1.10-Bandon.

Gentlemen:

This will acknowledge receipt of your airmail letter dated January 25th.

In your letter you state the Tide Water Associated Oil Company is a named insured under the above policy, and since suit has been filed against your company, you are tendering the defense of the action to us, because you state our policy provides the primary coverage.

It is true that your company is named as an additional insured under the above policy in so far as your interest is concerned in the operation of Wm. V. Sherer. However, attached to the policy is an Exclusion of Product Liability Endorsement, and because of this endorsement, we have already denied coverage to Mr. Sherer. For the same reason, this letter will be notice to you that our coverage does not apply to this case, and for this reason, Northwest Casualty Company is not in a position to defend the action which has been brought against your company.

Yours very truly,

PORTLAND CLAIM

DEPARTMENT,

/s/ FLOYD H. STUCKRATH,

Floyd H. Stuckrath, Manager.

FHS:cm

cc: Home Office Claim Dept.

In the District Court of the United States
for the District of Oregon

Civil No. 9168

TIDEWATER ASSOCIATED OIL COMPANY,
a Delaware corporation, Plaintiff,

vs.

NORTHWEST CASUALTY COMPANY, a
Washington corporation, Defendant.

ANSWER

Comes now the defendant Northwestern Mutual Insurance Company and for answer to the complaint of the plaintiff, admits, denies and alleges as follows:

First Defense

I.

Answering the allegations of the first cause of action, this defendant admits Paragraphs I and III.

II.

Admits that on or about the 9th day of January, 1953, the defendant issued and delivered a comprehensive policy No. 880-7277, but denies the remainder of Paragraph II.

III.

Admits that on or about January 25, 1956, plaintiff tendered the defense in the Buffington case to the defendant and that by letter dated January

27, 1956, the defendant denied liability under the policy, but denies the remaining allegations in Paragraph IV.

IV.

Denies Paragraph V and VI.

Second Defense

I.

Answering the allegations in the second cause of action, defendant admits and denies the allegations of Paragraph I in the manner in which they have been admitted and denied in the first defense.

II.

Admits that on or about January 25, 1956, the plaintiff tendered the defense of the Buffington action to the defendant, and that on January 27, 1956, by letter, the defendant refused to defend said action, but denies the remaining allegations in said paragraph II.

III.

Denies the allegations of Paragraph III.

Third Defense

I.

Defendant moves for an order dismissing the within cause of action on the ground that the court lacks jurisdiction over the subject matter for the reason that the summons heretofore served on the defendant does not comply with the requirements of O.R.S. 15.050.

Fourth Defense

I.

That accompanying the Policy of Insurance No. 880-7277 issued by the defendant and as a part of said policy, and qualifying the provisions thereof, is a duly executed rider in the following language:

“Exclusion of Product Liability

Exclusions (A) and (B) below are applicable only when checked.

X (A) Bodily Injury

It is agreed that the policy does not apply to bodily injury, sickness or disease, including death at any time resulting therefrom.

X (B) Property Damage

It is agreed that the policy does not apply to injury to or destruction of property (including loss of use of such property):

if caused by the handling or use of, or the existence of any condition in goods or products manufactured, sold, handled or distributed by the Insured when the occurrence takes place away from premises owned, rented or controlled by the Insured, and after the Insured has relinquished possession of such goods or products to others or if caused by operations if the accident occurs after such operations have been completed or abandoned at the place of occurrence (other than pick up and delivery, and the existence of tools, uninstalled equipment, and abandoned or unused material); provided, operations shall not be deemed incomplete because improperly or defectively performed

or because further operations may be required pursuant to a service or maintenance agreement.

Subject, otherwise, to all the terms and conditions of the policy.

Attached to and hereby made a part of policy No. of the Northwest Casualty Company, of Seattle, Washington.”

II.

That by reason of the foregoing rider and exclusion, no responsibility nor liability arose against the defendant by reason of the accident of December 3rd, 1953, and any expense of settlement incurred thereby.

Fifth Defense

I.

That if the plaintiff, or any one acting for it, made a settlement payment of \$15,000.00, it was done without knowledge, consent nor liability on the part of the defendant and was purely a volunteer payment for which the defendant is not liable.

Sixth Defense

I.

If the plaintiff incurred any attorney's fees or made other expenditures in defending or settling the claim arising out of the accident of December 3, 1953, such expenditure or charges were incurred by the plaintiff on its own volition and the defendant is not liable therefor.

Wherefore, having fully answered, the defendant prays for an order of this Court dismissing the complaint of the plaintiff and for its costs and disbursements.

/s/ WM. C. RALSTON,
Of Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 17, 1957.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The above entitled cause came on regularly for pre-trial conference before the undersigned Judge of the above entitled Court on December 16, 1957. Plaintiff appeared by C. E. Wheelock, of its attorneys, and the Defendant appeared by William C. Ralston, of its attorneys. The parties, with the approval of the Court, agreed upon the following:

Statement of Facts Pertaining to First and Second Cause of Action

I.

That the above entitled action was commenced in the Circuit Court of the State of Oregon for the County of Multnomah, the title being the same and the case number in said Court being 239-354. That upon being served, Defendant filed a petition for removal of said case, together with a removal bond, copy of complaint, copy of summons and answer

attached thereto, all properly verified; that Plaintiff has not and will not object to said removal.

II.

Plaintiff is a citizen of the State of Delaware. Defendant is a citizen of the State of Washington. The amount in controversy, exclusive of interest and costs, exceeds the amount of \$3,000.00.

III.

Plaintiff is and at all times herein mentioned, was duly licensed to carry on a gasoline and oil distributing business within the State of Oregon, and Defendant is and at all times mentioned herein, was licensed to carry on a general insurance business within the State of Oregon.

IV.

Defendant, on or about the 9th day of January, 1953, issued and delivered a Comprehensive Public Liability policy bearing its No. 880-7277, to Wm. V. Sherer, to which there was attached a rider entitled, "Exclusion of Product Liability", and that Plaintiff was an additional named insured in said policy and that the limits of said policy were \$25,000.00 for each person, and \$50,000.00 for each occurrence as to bodily injury. That said policy was in full force and effect on December 3, 1953.

V.

That on the 12th day of September, 1955, there was served upon Plaintiff a summons and complaint, entitled, "Ruth Buffington, Plaintiff, vs.

Wm. V. Sherer, Frank Moore, Jr. and Tidewater Associated Oil Company, a corporation, Defendants", being case No. 19175 in the Circuit Court of the State of Oregon in and for the County of Coos.

VI.

Plaintiff, on or about January 25, 1956, tendered the defense of the above entitled case hereinafter referred to as the "Buffington Case" to the Defendant and that Defendant, by letter dated January 27, 1956, denied any liability under the terms of said policy.

VII.

That thereafter Plaintiff procured counsel, proceeded to defend said action and did settle the same by paying to Ruth Buffington and Robert Buffington, her husband, the sum of \$15,000.00 in full settlement therefor.

Plaintiff's Contentions As To Plaintiff's First Cause of Action

I.

Plaintiff contends that the payment of the sum of \$15,000.00 to Ruth Buffington and Robert Buffington, her husband, in full settlement of the Buffington case was a fair and reasonable sum to be paid in the settlement thereof.

II.

Plaintiff contends that the action as brought by Ruth Buffington, known as the Buffington Case,

is subject to an action to which Plaintiff was afforded protection under the insuring agreements of the policy of insurance, No. 880-7277 issued by Defendant and that Defendant breached this contract of insurance with Plaintiff when it refused to accept coverage thereunder to Plaintiff's damage in the sum of \$15,000.00.

III.

Plaintiff contends that in addition to damages of \$15,000.00, it is entitled to a reasonable attorneys fee herein. That more than six months have elapsed since the tender of the Buffington Case to the Defendant, and that a reasonable attorneys fee would be the sum of \$3500.00.

Plaintiff's Contentions As To Plaintiff's Second Cause of Action

I.

Plaintiff contends that the Comprehensive Public Liability policy issued by Defendant, as hereinabove described, provides that Defendant shall defend any suit brought against the Plaintiff covered by the insuring agreements of said policy, and that Defendant in refusing to defend Plaintiff, after Plaintiff tendered to Defendant the defense of the Buffington Case, did procure counsel to defend said action and did incur and pay an attorneys fee of \$750.00, which was a reasonable fee therefor and did incur and pay costs amounting to \$260.73, all of which was necessarily incurred in the

defense of said action, to Plaintiff's further damage in the sum of \$1,010.73.

II.

Plaintiff contends that in addition to being damaged in the sum of \$1,010.73, Plaintiff is entitled to a reasonable attorneys fee herein. That more than six months have elapsed since the date of the tender of the said above mentioned Buffington Case to Defendant, and that a reasonable attorneys fee to be allowed in this second cause of action would be the sum of \$700.00.

Defendant's Contentions As To Plaintiff's

First and Second Causes of Action

The Defendant denies the foregoing contentions of the Plaintiff and further contends:

I.

The "Exclusion of Product Liability" rider attached to the liability policy No. 880-7277 excluded any coverage to the named insured for injury or destruction involved in or arising out of the accident occurring on or about December 3rd, 1953.

II.

The Defendant contends that it is not liable for attorneys fees incurred or alleged to have been incurred by the Plaintiff.

III.

The Defendant contends that it was under no obligation to defend any action brought against the

Plaintiff arising out of the accident of December 3rd, 1953.

IV.

That the Plaintiff is bound by the "Exclusion of Product Liability" rider attached to and made a part of Policy No. 880-7277 which reads as follows:

"Exclusion of Product Liability

Exclusions (A) and (B) below are applicable only when checked.

X (A) Bodily Injury

It is agreed that the policy does not apply to bodily injury, sickness or disease, including death at any time resulting therefrom.

X (B) Property Damage

injury to or destruction of property (including loss of use of such property): if caused by the handling or use of, or the existence of any condition in goods or products manufactured, sold, handled or distributed by the Insured when the occurrence takes place away from the premises owned, rented or controlled by the Insured, and after the Insured has relinquished possession of such goods or products to others or if caused by operations if the accident occurs after such operations have been completed or abandoned at the place of occurrence (other than pick up and delivery, and the existence of tools, uninstalled equipment, and abandoned or unused material); provided, operations shall not be deemed incomplete because improperly or defectively performed

or because further operations may be required pursuant to a service or maintenance agreement.

Subject, otherwise, to all the terms and conditions of the policy.

Attached to and hereby made a part of policy No. of the Northwest Casualty Company, of Seattle, Washington.”

V.

That the settlement of \$15,000.00, made by Plaintiff in the Buffington case, was done without the knowledge, consent or liability on the part of the Defendant and was purely a volunteer payment for which the Defendant is not liable.

VI.

That the Defendant was under no responsibility or liability for any claim, claims, expenditures or attorneys fees incurred or presented to the Plaintiff as a result of the accident of December 3, 1953.

Plaintiff denies Defendant's contentions.

Issues To Be Determined

I.

Did the policy of insurance entitled, “Comprehensive Public Liability policy No. 880-7277, issued by Defendant on or about the 9th day of January, 1953, together with the Exclusion of Product Liability endorsement attached thereto afford cover-

age thereunder to Plaintiff as against the liability as set forth in the Buffington case?

II.

Was the sum of \$15,000.00 paid by Plaintiff in settlement of the Buffington case a reasonable sum therefor?

III.

Was the sum of \$750.00, attorneys fees, and \$260.73, costs incurred by Plaintiff in the defense and settlement of the Buffington case, and if so, was it reasonable expense incurred in the defense and settlement thereof?

IV.

Have more than six months elapsed since the tender of the Buffington case by Plaintiff to Defendant, and if so, is the sum of \$3500.00 a reasonable attorneys fee to be allowed in Plaintiff's first cause of action herein, and the sum of \$700.00 a reasonable attorneys fee herein to be allowed Plaintiff in Plaintiff's second cause of action?

V.

Is the Defendant liable for the payment of any attorneys fee, and if so, in what amount?

Physical Exhibits

Certain physical exhibits have been received as pre-trial exhibits. The parties agreeing, with the approval of the Court, that no further identifica-

tion of the exhibits is necessary, and that photostatic copies may be marked and used in lieu of the originals. In the event that said exhibits, or any part thereof, shall be offered in evidence at the time of trial, said exhibits are to be subject to objections only on the ground of relevancy, competency and materiality.

Plaintiff's Exhibits

1. Release dated June 28, 1956, by and between Ruth Buffington and Robert Buffington, her husband and Tidewater Associated Oil Company, a corporation, Frank Moore, Jr. and Wm. V. Sherer.

2. Stipulation of dismissal in the case entitled, "Ruth Buffington, Plaintiff, vs. Wm. V. Sherer, Frank Moore, Jr. and Tidewater Associated Oil Company, a corporation, Defendants", being case No. 19175 in the Circuit Court of the State of Oregon in and for the County of Coos entered into in June, 1956, by and between D. J. Grant of attorneys for Plaintiff, and Andrew W. Newhouse, of attorneys for Defendant.

3. Photostatic copy of policy, Comprehensive Public Liability, No. 880-7277 of the Northwest Casualty Company issued December 24, 1952, together with riders attached thereto naming as insured Wm. V. Sherer and as additional insured, Tidewater Associated Oil Company.

4. Letter of Northwest Mutual Insurance Company of Seattle, Washington, dated January 27, 1956, addressed to Tidewater Associated Oil Company re policy No. 880-7277.

5. Loan agreement by and between Continental Casualty Company, a corporation and Tidewater Oil Company, a corporation.

6. Letter dated April 23, 1956, from Andrew J. Newhouse to Continental Casualty Company re Buffington case.

7. Letter dated June 29, 1956, from A. J. Newhouse to Continental Casualty Company re Buffington case.

8. Statement dated July 25, 1956, from McKeown, Newhouse & Johnson to Continental Casualty Company re cost in Buffington case.

9. Photostatic copy of complaint and summons in case entitled, "Ruth Buffington, Plaintiff, vs. Wm. V. Sherer, Frank Moore, Jr. and Tidewater Associated Oil Company, a corporation, Defendants, being case No. 19175 in the Circuit Court of the State of Oregon in and for the County of Coos.

10. Endorsement for insurance policy entitled, "Erroneous Delivery of Fluids or Semi-Fluids".

Defendant's Exhibits

1. Statement of William V. Sherer dated May 27, 1954.

2. Statements of Frank L. Moore, Jr. dated May 28, 1954 and June 2, 1954.

3. Letter from Northwest Casualty Company to William V. Sherer, dated June 9, 1954.

4. Statement of Jay Hess dated June 3, 1954.

5. Letter from James G. Frame to Frank Moore, Jr. dated June 10, 1954.

Jury Trial

No request has been made by Plaintiff or Defendant for trial by jury.

The parties hereto agree to the foregoing Pre-Trial Order and the Court being fully advised in the premises:

Now Orders that the foregoing Pre-Trial Order shall not be amended except by consent by both parties, or to prevent manifest injustice; and

It Is Further Ordered that the Pre-Trial Order supercedes all pleadings; and

It Is Further Ordered that upon trial of this cause no proof shall be required as to matters of fact hereinabove specifically found to be admitted, but that proof upon the issues of fact and law between Plaintiff and Defendant as hereinabove stated shall be had.

Dated at Portland, Oregon, this 22nd day of January, 1958.

/s/ GUS J. SOLOMON,
Judge.

Approved:

/s/ C. E. WHEELOCK,
Of Attorneys for Plaintiff.

/s/ WM. C. RALSTON,
Of Attorneys for Defendant.

[Endorsed]: Filed January 22, 1958.

[Title of District Court and Cause.]

OPINION

Solomon, Judge:

I am of the opinion that the sum of \$15,000.00 paid in settlement of the case brought by Ruth Buffington against Wm. V. Sherer, Frank Moore, Jr., and Tidewater Associated Oil Company was a reasonable sum and that the attorney fees charged and the expenses incurred in the defense of that action were likewise reasonable.

However, I am of the opinion that the "Exclusion of Product Liability" rider attached to the policy issued by Northwest Casualty Company to Wm. V. Sherer deprived him, as well as the other defendants named in the action brought by Ruth Buffington, of any coverage for the accident and injuries therein described.

I further find that Northwest Casualty Company was not obligated to defend the action, to settle it, or to pay any judgment that may have been rendered had the action not been settled.

Attorneys for the defendant shall prepare findings of fact, conclusions of law, and a judgment in accordance with this opinion.

[Endorsed]: Filed April 17. 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

I.

That the plaintiff is a citizen of the state of Delaware, and the defendant is a citizen of the state of Washington. That the amount in controversy, exclusive of interest and costs exceeds the amount of \$3,000.00.

II.

That the plaintiff was licensed to and was carrying on a gasoline and oil distributing business within the state of Oregon and had entered into a "Distribution Consignment" contract with one William V. Sherer, of Bandon, Coos County, Oregon. That said contract was in full force and effect at all times herein mentioned.

III.

That the defendant was duly qualified to carry on a general insurance business in the State of Oregon and elsewhere.

IV.

That on or about the 9th day of January, 1953, the defendant executed and delivered to William V. Sherer, a "Comprehensive Public Liability" policy of insurance being No. 880-7277 with the plaintiff as an additional named insured. That said policy was in full force and effect on the 3rd day of December, 1953.

V.

That on the 1st day of December, 1953, one Ruth Buffington placed an order for stove oil with the said William V. Sherer and the plaintiff, and that a delivery was made.

VI.

That on the 3rd day of December, 1953, Ruth Buffington attempted to start a wood fire with the product delivered and that the same exploded, severely burning the said Ruth Buffington and also causing property damage.

VII.

That on September 12, 1955, Ruth Buffington served upon the plaintiff and others, a summons and complaint for the recovery of damages caused by the explosion hereinabove referred to, claiming negligence and violation of warranty.

VIII.

That the plaintiff, on January 25, 1956, tendered the defense of the said action brought by Ruth Buffington to the defendant. The defendant denied coverage under its policy and refused to defend.

IX.

That the defendant's policy of insurance hereinabove referred to, in part reads:

“Exclusion of Product Liability
Exclusions (A) and (B) below are applicable only when checked.

X (A) Bodily Injury

It is agreed that the policy does not apply to bodily injury, sickness or disease, including death at any time resulting therefrom.

X (B) Property Damage

It is agreed that the policy does not apply to injury to or destruction of property (including loss of use of such property), if caused by the handling or use of, or the existence of any condition in goods or products manufactured, sold, handled or distributed by the Insured when the occurrence takes place away from the premises owned, rented or controlled by the Insured, and after the Insured has relinquished possession of such goods or products to others or if caused by operations if the accident occurs after such operations have been completed or abandoned at the place of occurrence (other than pick up and delivery, and the existence of tools, uninstalled equipment, and abandoned or unused material); provided, operations shall not be deemed incomplete because improperly or defectively performed or because further operations may be required pursuant to a service or maintenance agreement.

Subject, otherwise, to all the terms and conditions of the policy.

Attached to and hereby made a part of policy No. of the Northwest Casualty Company, of Seattle, Washington."

X.

The plaintiff was also insured by a policy of in-

surance executed and delivered by the Continental Casualty Company, who, through some loan agreement with the plaintiff, did employ counsel and settle said action brought against the plaintiff and others; the property damage claim and the claim of the defendant's husband for the sum of \$15,000.00 and obtained releases. That attorney's fees and costs expended was the sum of \$1010.73.

Conclusions of Law

Based upon the foregoing Findings of Fact, the Court concludes:

I.

That this court has jurisdiction over this cause and the respective parties.

II.

That under the "Comprehensive Public Liability" policy executed by the defendant, there was no obligation requiring the defendant to accept the defense for this plaintiff or any of the defendants in the case of Ruth Buffington vs. Tidewater Associated Oil Company, et al, nor to make any settlement or pay any judgment that might have been recovered in said action.

III.

That the settlement made and the attorney's fees and costs paid in the defense of the Plaintiff were reasonable charges and amounts.

IV.

That the defendant is entitled to judgment in its favor.

Made and entered this 29th day of April, 1958.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed April 29, 1958.

In The United States District Court
For The District of Oregon

Civil No. 9168

TIDEWATER ASSOCIATED OIL COMPANY,
a Delaware corporation, Plaintiff,

vs.

NORTHWEST CASUALTY COMPANY, a Wash-
ington corporation, Defendant.

JUDGMENT

Based on the Findings of Fact and Conclusions of Law heretofore made and entered herein,

It Is Considered, Ordered and Adjudged that the complaint of the plaintiff be, and it is hereby dismissed, and that the defendant have and recover judgment against the plaintiff for costs and disbursements herein incurred, taxed at \$20.00 and let execution issue therefor.

Dated this 29th day of April, 1958.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed April 29, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Tidewater Associated Oil Company, a Delaware corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on the 29th day of April, 1958.

WHEELOCK, RICHARDSON &
NIEHAUS,
/s/ C. R. RICHARDSON,
Attorneys for Appellant, Tidewater
Associated Oil Company.

[Endorsed]: Filed May 27, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant will contend that the action as brought by Ruth Buffington, and known in this action as

the Buffington Case, is such an action to which plaintiff-appellant was afforded protection under the insuring agreements of the policy of insurance, being plaintiff's Exhibit Number 3, and that defendant-appellee breached said contract of insurance with plaintiff-appellant when it refused to defend said action known as the Buffington Case and to accept coverage thereunder, to plaintiff-appellant's damage as set forth in its Complaint.

Dated at Portland, Oregon, this 6th day of June, 1958.

WHEELOCK, RICHARDSON &
NIEHAUS,

/s/ By C. R. RICHARDSON,
Of Attorneys for Plaintiff-
Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 6, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint, Answer, Pre-trial Order, Opinion of Judge Solomon, Findings of Fact, Conclusions of Law, Judgment, Notice of Appeal, Undertaking for Cost

on Appeal, Designation of record on appeal with excerpt from Reporter's Transcript, attached, Order to forward exhibits, Defendant's Designation of record on appeal, and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 9168, in which Tidewater Associated Oil Company, a Delaware corporation is the plaintiff and appellant, and Northwest Casualty Company, a Washington corporation, is the defendant and appellee; that said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there are enclosed herewith exhibits numbered 1 to 5, 9 & 10, inclusive.

I further certify that the cost of filing the notice of appeal \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 24th day of June, 1958.

[Seal]

R. DeMOTT,

Clerk,

/s/ By MILDRED SPARGO,
Deputy.

[Endorsed]: No. 16072. United States Court of Appeals for the Ninth Circuit. Tidewater Associated Oil Company, a corporation, Appellant, vs. Northwest Casualty Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: June 25, 1958.

Docketed: July 3, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 16072

TIDEWATER ASSOCIATED OIL COMPANY,
a Delaware Corporation, Appellant,

vs.

NORTHWEST CASUALTY COMPANY, a Wash-
ington Corporation, Appellee.

APPELLANT'S DESIGNATION OF THE REC-
ORD TO BE PRINTED WITH STIPULA-
TION OF COUNSEL FOR APPELLANT
AND APPELLEE

Appellant hereby designates the matters referred
to herein as the record to be printed and neces-

sary for consideration as follows:

- (1) Complaint (together with Exhibits attached).
- (2) Answer.
- (3) Pre-Trial Order.
- (4) Opinion of the Court.
- (5) Findings of Fact and Conclusions of Law.
- (6) Judgment.
- (7) Statement of Points upon which Appellant intends to rely on appeal, as set forth in Appellant's Designation of Contents of Record on Appeal.
- (8) This Designation of Parts of the Record.

/s/ C. R. RICHARDSON,
Of Attorneys for Appellant.

Stipulation

It Is Hereby Stipulated by and between counsel for appellant and counsel for appellee that the exhibits as set forth in Appellant's Designation of Contents of Record on Appeal and Appellee's Designation of Contents of Record on Appeal may be read in their original form; and

It Is Further Stipulated that at the time of the trial of the above-entitled cause in the United States District Court for the District of Oregon, that counsel for the respective parties stipulated that more than six months had elapsed since the tender of the cause of action known as the "Buffington Case" by plaintiff therein to defendant therein, being appellant and appellee herein respectively,

and that the Court, in the event of a judgment in favor of plaintiff, could set the attorneys' fees for plaintiff, the appellant herein, as to both causes of action in plaintiff-appellant's Complaint, in such sum as the court determined just and reasonable.

Dated at Portland, Oregon, this 2nd day of July, 1958.

/s/ C. R. RICHARDSON,
Of Attorneys for Appellant.

/s/ LEO LEVENSON,
Of Attorneys for Appellee.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 3, 1958. Paul P. O'Brien,
Clerk.

NO. 16072

United States
COURT OF APPEALS
for the Ninth Circuit

TIDEWATER ASSOCIATED OIL COMPANY,
a Corporation,

Appellant,

vs.

NORTHWEST CASUALTY COMPANY,
a Corporation,

Appellee.

APPELLANT'S BRIEF

*Appeal from the United States District Court
for the District of Oregon.*

PHILLIPS & SANDEBERG,
WM. C. RALSTON,
W. K. PHILLIPS,
Public Service Building,
Portland 4, Oregon,

WHEELLOCK, RICHARDSON & NIEHAUS,
C. R. RICHARDSON,
Corbett Building,
Portland 4, Oregon,
For Appellant.

LEO LEVENSON,
314 Portland Trust Building
Portland 4, Oregon
For Appellee.



FILED

OCT 6 1958

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United States
COURT OF APPEALS
for the Ninth Circuit

TIDEWATER ASSOCIATED OIL COMPANY,
a Corporation,

Appellant,

vs.

NORTHWEST CASUALTY COMPANY,
a Corporation,

Appellee.

APPELLANT'S BRIEF

*Appeal from the United States District Court
for the District of Oregon.*

**STATEMENT OF PLEADINGS
AND JURISDICTION**

The Complaint was filed on May 2, 1957, in the Circuit Court of the State of Oregon for the County of Multnomah (R., pp 3, 6). A petition for removal was filed in the United States District Court for the District of Oregon on May 17, 1957, on the basis that said controversy was between citizens of different states and exceeded the sum of \$3,000.00, thus giving said court jurisdiction (Title 28, U. S. C. A., †1332,

and Title 28, U. S. C. A., †1441). On May 17, 1957, an answer was tendered and filed by appellee (R., pp 21, 25). The judgement was filed on April 29, 1958 (R., pp 41, 42). Thereafter, a notice of appeal was filed by appellant on May 27, 1958 (R., p 42), and this court has jurisdiction to hear said appeal under 28 U. S. C. A. 1291.

STATEMENT OF THE CASE

Appellee, on the 24th day of December, 1952, issued and delivered to one, Wm. V. Sherer, its certain Comprehensive Public Liability Policy, No. 880-7277 (See appellant's Trial Exhibit No. 3). Sherer was employed as a gasoline and oil distributor by appellant at Bandon, Coos County, Oregon. Said policy provided coverage for bodily injury not to exceed \$25,000.00 for each person and \$50,000.00 for each occurrence, and appellant by endorsement upon said policy was a named insured so far as its interest was concerned in the operation of Wm. V. Sherer. Attached to the policy was an endorsement entitled, "Exclusion of Product Liability."

On December 1, 1953, Ruth Buffington, who resided near Bandon, Oregon, ordered stove oil through appellant's distributor, Wm. V. Sherer, to be put in a stove oil storage tank, which was attached to the outside of said residence (R., pp 7, 18). Pursuant to the order, a truck drove to the residence on December 2, 1953, and before any stove oil had been placed in the storage tank, Ruth Buffington requested the driver to fill a small can which she kept on the back porch, and stove oil from which she used in order to facilitate the starting of fires in the kitchen stove. The truck was divided into compartments, one of which contained

stove oil, one of which contained regular gasoline, and one of which contained ethyl gasoline. One hose served all three compartments. The driver took this hose and filled the small can. Immediately prior to this, the driver had used the hose to deliver gasoline (R., p 12). Ruth Buffington took the small can on the morning of December 3, 1953, and in using the contents of the same to facilitate starting her kitchen stove fire was seriously and severely burned when the can exploded and enveloped her in flames. (R., pp 13, 14).

On September 12, 1955, appellant was served with Summons and Complaint in an action brought by Ruth Buffington (R., p 7, 18). The policy mentioned above, being in full force and effect on this date, appellant tendered the defense of the above action to appellee, who by letter denied liability under the policy and refused to defend the same on behalf of appellant or any of the other defendants named, including Wm. V. Sherer (R., pp 19, 20). The appellant, through its excess coverage insurer, Continental Casualty Company, thereupon undertook to defend the action and prior to trial compromised and settled the same for the sum of \$15,000.00, and in doing so further expended \$750.00 attorneys fees, and \$260.73 in costs (R., pp 39, 40).

Appellant then brought an action against appellee for refusal to accept liability and for refusal to defend (R., pp 3, 6). At the trial it was stipulated that more than six months had elapsed since the tender of the defense as mentioned above, and the court, in the event of a decision favoring appellant, could set reasonable attorneys fees on

the two causes of action in appellant's Complaint. It was the opinion of the court that although the \$15,000.00 paid in settlement of the Buffington action was reasonable as were the expenditures for costs and attorneys fees, there was no coverage afforded appellant under the policy and no obligation of the appellee to defend appellant in said action. The opinion was based upon the rider attached to the policy entitled, "Exclusion of Product Liability" (R., pp 38, 39).

STATEMENT OF POINTS TO BE URGED

The court below erred in that the action brought by Ruth Buffington against appellant was such an action to which appellant was afforded protection under the insuring agreements of the policy of insurance (Appellant's Trial Exhibit No. 3), and appellee breached said insurance contract by:

(1) Failing to accept coverage in view of the negligence alleged in the Buffington Complaint,

AND

(2) Failing to defend appellant in said action in accordance with the terms of said policy.

SUMMARY OF ARGUMENT

The District Court's conclusion that the Ruth Buffington Complaint did not describe an accident and injuries bringing it within the coverage of the policy issued by appellee because of the rider attached and entitled, "Exclusion of Product Liability," and that appellee had no duty to defend appellant and the other insureds, is against the great weight of authority.

The controlling factors in determining whether or not there is coverage afforded appellant under the Comprehensive Public Liability Policy issued by appellee are the matters contained within the allegations of the Ruth Buffington Complaint. If any one of the allegations bring the action within the coverage of the policy or could reasonably be construed to be covered therein then it was the duty of the appellee to defend appellant.

In the event such defense is refused when tendered, the general and prevailing rule is that the insurer is liable not only for the costs of defense and attorneys fees incurred by insured, but the insured may make reasonable settlement or compromise of the action and obtain reimbursement from the insurer.

The negligence alleged in three of the four allegations contained within the first cause of action of the Buffington Complaint (R., pp 11, 13) is directed to the negligent use of the hose upon the truck by the driver, as well as the use of faulty equipment of the appellant. Certainly these allegations of negligence are not directed to a product of the appellant or a defect in a product of the appellant such as might be covered in "Exclusion of Product Liability" endorsement.

It is the apparent and clear intention of Ruth Buffington to claim that appellant's fuel truck with three compartments served with but one hose was faulty equipment when used to dispense both explosive and non-explosive fuel, and it was this negligence which proximately contributed to the accident and injuries suffered by Ruth Buffington. This liability is covered under the general insuring agreements of the policy.

ARGUMENT

Where the provision of a liability policy requires the insurer to defend an action brought against the insured and the insurer refuses to defend in the name of the insured, the insured may proceed to defend the action and hold the insurer liable for such sums as were expended in good faith in compromise and settlement of the action, as well as reasonable costs and attorneys fees involved. The appellee, in view of the negligence alledged in the Buffington Complaint (R., pp 11, 13), had a duty to defend the appellant, and breached its said contract of insurance in failing to do so.

The general rule is that when the requirement to defend is a policy provision, then the duty is determined by the allegations of the complaint filed against the insured.

50 ALR 2d, p 465.

8 Appleman, Insurance Law & Practice, paragraphs 4684-5.

Where a complaint filed against an insured clearly alleges damages resulting from an alleged negligent operation of the insured and a policy of insurance provides that the insurer shall defend all suits even if groundless, it has been held that the language of the contract must first be looked to, and next the allegations of the complaint in the action against the insured, and the refusal to defend by the insurer is a breach of the contract, and the insured by such action is released from any obligation to leave the management of the suit to the insurer and is justified in proceeding to defend on his own account.

Lamb vs. Belt Casualty Co., 3 Cal. APP (2d) 624, 40 P (2d) 311.

Where the allegation of facts within a complaint are partly within and partly outside of the policy coverage, the insured has a duty to defend, and even though there be a conflict as between the allegations of the complaint and the known facts, the better view is that the courts will adhere to the rule that the allegations of the complaint are controlling.

50 ALR 2d, pp 496 and 506.

Remmer v. Glen Falls Indem. Co. (1956) (Cal. APP 2d), 295, P2d 19.

It is further stated in 50 ALR 2d at page 506, paragraph 24, as follows:

“Where a complaint alleges facts which represent a risk outside the coverage of the policy but also avers facts, which, if proved, represent a covered risk, the insurer is under a duty to defend. Stated differently the fact that grounds of damage against the insured other than those stated in the policy, and liability against others than the insured, were pleaded, is immaterial if the injured person pleaded any grounds against the insured coming within the terms of the policy.” (Citing many authorities)

The court stated in the case of Boutwell vs. Employers Liability Assur. Corp. (1949) (CA 5th Miss.) 175 F2d, 597, in speaking of the duty of the insurer under an agreement to defend:

“Its obligation was not merely to defend in cases having perfect declarations, but in cases where by any reasonable intendment of the pleadings liability could be inferred.”

Even though the action filed against insured eventually proved groundless and was defeated, it has been held that

the insurer was required to defend an action in which the cause was based on a claim for damages covered by the policy, wherein insurer agreed or undertook to defend such suit whether groundless or not, and the insurer held liable for the costs and expenses of the insured in making his own defense to said action.

Bloom-Rosenblum-Kline Co. v. Union Indem. Co.,
121 Ohio ST 220, 167 N. E. 884.

Journal Publishing Co. v. General Casualty Co.,
210 F2d 202.

8 Appleman, Insurance Law & Practice, paragraph
4691.

If an insurer unjustifiably refuses to defend a suit, the insured may make a reasonable settlement or compromise of the injured person's claim, and is then entitled to reimbursement from the insurer.

8 Appleman, Insurance Law & Practice, paragraph
4690.

It would therefore appear to be the general and prevailing rule that an insurer has the duty to defend where any one of the allegations of a complaint brought against an insured are within the general insuring agreements of the policy. In the case at hand, appellant, upon the appellee's refusal to defend, proceeded to defend and settle and compromise the Buffington claim by the payment of \$15,000.00, which the lower court determined to be a fair and reasonable sum in the settlement thereof, and in such defense expended the sum of \$260.73 actual costs, and \$750.00 attorneys fees, which the lower court also determined to be fair and reasonable sums, so that the reasonableness of the

settlement and the costs and attorneys fees is not at issue in this appeal, nor is there at issue in this appeal the right of appellant to recover attorneys fees upon the complaint brought against appellee in the event of a favorable decision to appellant, in that in the lower court it was stipulated that the court could set such fees in such event (R., pp 46, 47).

Under Oregon law, an insured has the right to recover reasonable attorneys fees from an insurer who has refused to defend an action brought against the insured where more than six months has expired from the date of the tender and no settlement is made by insurer.

Journal Publishing Co. v. General Casualty Co.,
210 F2d 202. (supra).

Oregon Revised Statutes, Section 736.325.

The allegations of the complaint brought against an insured under a Public Liability Policy are the controlling factors in determining whether or not there is coverage for the insured under the policy.

The averments of negligence set forth in the first cause of action of the Buffington Complaint were such allegations as brought the action within the general insuring agreements of the Comprehensive Public Liability Policy written by appellee and upon which appellant appeared as a named insured.

The general insuring agreements of the policy of insurance in question read as follows (See Page 2, Appellants' Trial Exhibit No. 3):

"INSURING AGREEMENTS

1. To pay on behalf of the Insured, all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law, or assumed by him under any warranty of goods or products, or any written contract:

(a) for damages, including damages for care and loss of services, because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained or alleged to have been sustained by any person or persons;"

The allegations of negligence set forth in the first cause of action of the Buffington Complaint are as follows: (R., pp 11, 13)

"IX.

That Plaintiff's injuries heretofore mentioned and as hereinafter set forth were proximately caused by the carelessness and negligence of the Defendants, in the following particulars, to-wit:

(a) In furnishing to Plaintiff a petroleum product other than stove oil, or in furnishing another petroleum product mixed with stove oil, either of which when used for the purpose for which the Defendants knew it was going to be used, was highly explosive and would ignite with great fury and violence, was extremely dangerous and under no circumstances adaptable for the use for which Plaintiff desired said petroleum product, all of which was known to the Defendants, or with reasonable care and caution should have been known to the Defendants.

(b) That Defendants pumped from the only hose located on the truck used in the delivery of said petroleum product and into plaintiff's can a petroleum product which Defendants represented to be stove oil, when Defendants had immediately prior thereto pumped through the same hose gasoline, and when said Defendants knew, or in the exercise of reasonable care should have known, that said hose still contained

gasoline and that said gasoline would be the first petroleum product to go into said can from said hose, and when used for the purpose for which Plaintiff intended to use the same, whether entirely gasoline or a mixture of gasoline and stove oil would constitute a highly explosive and dangerous material not suited or intended for the use contemplated by Plaintiff, and likely to cause serious injury to Plaintiff.

(c) In failing to pump a sufficient quantity of petroleum product into the stove oil storage tank, thereby removing all trace of gasoline from said hose, and thereby eliminating the possibility that said hose contained any gasoline prior to placing any stove oil in the can for Plaintiff.

(d) In failing to have and maintain upon said truck a separate hose to be used exclusively for stove oil, and thereby preventing a highly combustible, explosive, inflammable and dangerous product such as gasoline, or a highly combustible, explosive, inflammable and dangerous product such as a mixture of gasoline and stove oil, being delivered to a person for the purpose of facilitating the starting of kitchen stove fires, and particularly, to this plaintiff when the same was represented to her to be entirely stove oil."

Appellant makes no point as to allegation (a), but as to the remaining allegations of the Buffington Complaint stated above, appellant alleges that they are within the general insuring agreements of the policy of insurance in question, in that the acts of negligence are directed to the use of faulty equipment and/or the negligence of the truck driver and not a product of the insured or a defect in a product manufactured by the insured. In paragraph (b) and (c) the claimant alleges that the negligence was the pumping of fuel oil products from a tank truck through a single hose serving both explosive and non-explosive products and failing to properly rid the hose of a highly

explosive product before delivering a non-explosive product. Allegation (d) is directed to the negligence of the appellant in using and operating a fuel oil truck without a separate hose upon it to deliver stove oil, a non-explosive product, but using the same hose for both non-explosive and highly explosive fuels. It would seem to clearly indicate an intention on the part of the pleader that the use of the faulty equipment and/or the negligence of the truck driver was the negligence proximately contributing to the accident alleged in the Buffington Complaint. The following are cases supporting this contention:

Employers Liability Assurance Corp., Ltd., vs. Youghiogheny & Ohio Coal Co., (United States Court of Appeals, Eighth Circuit, July 7, 1954) 214 F2d, 418.

This case involved an action by an insured coal company against its liability insurer, which had refused to defend a personal injury action brought against the insured, to recover damages alleged to be within coverage of the policy. In this case, the coal company at its premises in Superior, Wisconsin, accepted, prepared for loading, and loaded with coal a certain freight car. The car was thereafter delivered to the Great Northern Railway Company, "spotted" on a siding at Princeton, Minnesota, and an employee of the consignee of the car, one Burnett, in attempting to open one of the sliding doors of the car was severely injured when the door left its moorings and crashed down upon him. The injured party brought an action against the coal company and railroad companies involved. That among the acts of negligence alleged were the following:

"That said coal company knew, or in the exercise of reasonable or ordinary care should have known,

that said railroad freight car was in bad order and unfit for the transportation of coal. ***

“That said coal company knew, or in the exercise of reasonable or ordinary care should have known that in the type of car furnished it by its co-defendants there is required to be erected and securely fastened a false door, so as to prevent the bulk coal from pressing against the outside sliding doors of said car.

“That said defendant coal company carelessly and negligently failed and neglected, either to install the false door or sheeting between the outside door and the bulk coal proper, or carelessly and negligently failed and neglected to properly secure said false door or sheeting so that said bulk coal would not bear its weight, in whole or in part, directly against the outside of (the) sliding door of said car.”

The policy contained the usual insuring agreements of a liability policy covering the coal company's premises and operations at Superior, Wisconsin, including an agreement to defend. That among the exclusions in said policy was one defining products, which is almost identical to the one in the case at hand. The insurance carrier refused to defend after a tender of the defense, claiming that the injuries were not covered by the policy and were excluded by reason of the products clause, as well as another clause having to do with “vehicles * * * or the loading or unloading thereof, * * *.” The coal company accordingly undertook its own defense, and during the course of the trial “upon advise of counsel” settled the case.

The trial court filed an opinion, and its conclusion was expressed in portions as follows:

“The question of coverage is to be determined from the allegations in the complaint against the insured.

“With respect to defendant’s contention that the products liability coverage which plaintiff could have, but had not, purchased would have granted it protection, the short answer is that if the injury to Burnett resulted from a defective freight car or in negligence in failing to discover and remedy such defect or even in the faulty preparation of the car prior to loading, as alleged by Burnett no defective condition in the products handled by the plaintiff was involved. Certainly, the freight car was not a product of the insured.”

The appellant court upheld the decision of the lower court and stated as follows:

“ . . . it was not the negligent handling of the product coal, in the loading of the car in Wisconsin in this case, but the negligence of the defendant in loading and shipping the coal in a defective car.

“As pointed out by the trial court, ‘the allegations of Burnett’s complaint with respect to the liability of this plaintiff (coal company) had nothing to do with the products of the insured . . .’ We cannot say that the court erred in so holding.”

Philadelphia Fire and Marine Insurance Company,
et al, vs. Grandview 42 Wash. 2d 357, 255 P2d, 540.

The above case involved the same insurance company as the appellee herein, and furthermore the policy was for all purposes identical even to having attached thereto an “Exclusion of Product Liability” clause identical to the one attached to the policy in the case before this court. An action was brought against the City of Grandview by one Hunt, whose home was damaged when an explosion occurred in the residence next door owned by one Russell. The basis of a judgment received by Hunt against the City of Grandview was that the water department of the

City of Grandview, by and through its superintendent, negligently and carelessly permitted a highly inflammable and explosive methane gas to be introduced, pumped into and carried through the pipes of its water system to dwellings within the City of Grandview, including the dwelling of Russell, and in negligently and carelessly directing the Russells to open their faucets and permit the gas to enter into and fill their residence when they knew, or should have known, that it would ignite, explode and cause damage. The Supreme Court affirmed the holding of the trial court and stated that the proximate cause of the accident was the negligence of the employees of the city and that the product liability exclusion endorsement did not cover the situation presented and that the negligence was within the general insuring agreements of the policy.

A. R. Heyward, II, and C. D. Tucker, doing business as W. B. Guimarin & Company, plaintiffs, vs. American Casualty Company of Reading, Pennsylvania, defendant (United States District Court E. D. So. Carolina, Columbia Division, March 2, 1955) 129 F. Supp 4.

This was an action brought for a declaratory judgment that liability insurer had an obligation to defend an action in the State Court against insured and pay any judgment rendered. The court held that the allegations of the complaint and answer in the State Court action raised substantial fact issues requiring the insurer to defend. The facts of the case were that the insured had a sub-contract on a large housing project for the plumbing and heating portion of the project, which involved, among other things, the construction of underground gas lines. That as the units were completed, they were apparently occupied, and

prior to the completion of the entire project an explosion occurred in one of the apartments causing personal injuries to a person who thereafter proceeded against the insured in the State Court, as well as other contractors upon the job, the housing authority and the sureties on performance bonds given by the various contractors.

The policy involved was a comprehensive liability policy covering both personal injury and property damage, and the insuring agreements were similar to the policy involved in the present case. The policy further contained an agreement to defend suits brought against the named insured, even if they were groundless, false or fraudulent, and also by an endorsement declared that the policy did not apply to product liability, which was defined under the term "Definitions" to mean as set forth therein, which terminology is for purposes of argument here, almost identical.

The court, after considerable discussion as to the meaning of words and phrases and language used generally in insurance policies and the difficulty of interpretation thereof, stated as follows:

"Products liability, to the average person, refers to liability arising out of the use of, or existence of any condition in goods or products manufactured, sold, handled or distributed by the insured. The suit in the State Court involved no such liability, but is based on alleged negligent construction by the plaintiff.

"(8) After a careful analysis of all the relevant provisions of the policy, I must conclude that a plumbing and heating contractors comprehensive liability coverage is not covered under the heading 'Products,' and that the policy here involved should be construed to cover the liability for accidents arising from plain-

tiff's operations whether the accident happened before or after the housing project was completed.

"A careful analysis of the complaint in the State Court will show that it does not clearly and definitely allege that plaintiff's 'Operations' had been completed. The allegations of the complaint indicate a clear intention on the part of the pleader to claim that the gas installations leading into Apartment 14-E were negligently constructed. It did not matter to the plaintiff whether he was injured before or after the plaintiff's 'Operations' had been completed. It is clearly apparent from the allegations of the complaint in the State Court action that the plaintiff could have recovered by showing that the explosion occurred before plaintiff's 'Operations' on this project had been completed. This being true the Insurance Company owed a duty to the plaintiff to defend the action. *Employers Mutual Liability Ins. Co. of Wisconsin vs. Hendrix*, 4 Cir., 199 F. 2d 53; *Lee v. Aetna Casualty & Surety Co.*, *supra*, 178 F. 2d 750; *Boutwell v. Employers Liability Assurance Corp.*, 5 Cir., 175 F. 2d 597. To paraphrase Judge Soper's language in the *Hendrix* case, *supra*: In other words, it was obvious to the insurer upon reading the complaint that it was not essential to recovery that the claimant show that plaintiff's 'Operations' had been completed, because claimant could recover damages from defendants by merely showing that they were negligent in the construction of the project.

"In *Boutwell v. Employer's Liability Assurance Corp.*, *supra*, 175 F. 2d 597, 599, the facts were quite similar to those here involved. In that case the Court of Appeals for the Fifth Circuit, after stating that the duty of the Insurance Company to defend, must be determined by the allegations in the declaration in the suit against the insured, then said: 'We also think it is quite clear that if the Appellant had fully completed the work of installation of a gas heater, and that the fire had occurred thereafter by virtue of defects in the appliances fully installed, there

would have been no liability under the policy. Nevertheless, if the allegations of the plaintiffs were to the effect that the damage was caused by the negligence of the appellant in the installation or in the failure to exercise reasonable care in installing the instrumentalities for use in transmitting and utilizing so volatile a substance as gas, there would have been an obligation under the policy upon the insurer to defend the suits and to pay the amount of the judgments, costs, and expenses in the event of recoveries under such allegations."

CONCLUSION

The decision of the court below should be reversed and the appellant awarded judgment for the amounts as prayed for in its Complaint, as well as reasonable attorneys' fees to be therein determined.

Respectfully submitted,

WHEELOCK, RICHARDSON & NIEHAUS,

CLYDE R. RICHARDSON

Attorneys for Appellant

APPENDIX

At the commencement of the trial in the lower court, plaintiff offered the Complaint, together with the exhibits attached, as an additional plaintiffs exhibit to the Pre-Trial Order, and all of the plaintiff's and defendant's exhibits contained within the Pre-Trial Order were offered by the respective parties and allowed and made a part of the record. Appellee offered additional exhibits, which were allowed, but none of them appear in Appellant's Designation of Record on Appeal.

United States
COURT OF APPEALS
for the Ninth Circuit

TIDEWATER ASSOCIATED OIL COMPANY, a
corporation,

Appellant,

v.

NORTHWEST CASUALTY COMPANY, a cor-
poration,

Appellee.

BRIEF OF APPELLEE

*Appeal from the United States District Court for the
District of Oregon.*

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PAUL P. O'BRIEN

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No. 16072

United States
COURT OF APPEALS
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TIDEWATER ASSOCIATED OIL COMPANY, a
corporation,

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NORTHWEST CASUALTY COMPANY, a cor-
poration,

Appellee.

BRIEF OF APPELLEE

*Appeal from the United States District Court for the
District of Oregon.*

JURISDICTION

This is an action on a policy of liability insurance commenced in the Circuit Court of the State of Oregon for Multnomah County, by Tidewater Associated Oil Company, a Delaware Corporation against Northwest Casualty Company, a Washington Corporation. The amount in controversy, after excluding interest and costs, is more than \$3000. The action was removed to the United States District Court for the District of Oregon upon defendant's petition. The District Court

had jurisdiction under 28 USCA Sec. 1332 and 28 USCA Sec 1441.

Findings of Fact, Conclusions of Law and Judgment in favor of appellee were entered. This court acquired jurisdiction under 28 USCA Sec. 1291.

STATEMENT OF THE CASE

Appellee executed and delivered to William Sherer a "Comprehensive Public Liability" policy of insurance with appellant Tidewater Associated Oil Company as an additional named insured, which policy was at all times in force.

On December 1, 1953 Ruth Buffington ordered some stove oil from Sherer and the same was delivered to her by truck the next day and put in a can which she provided. This can was placed on the back porch of her residence.

On December 3, 1953 she attempted to start a wood fire with the product delivered by Sherer and the same exploded, causing her personal injuries and property damage.

On September 12, 1955 she served upon appellant and others, a summons and complaint, in an action for the recovery of damages caused by the explosion and she alleged negligence and also breach of warranty.

Appellant tendered the defense of said action to appellee and it denied coverage under its policy and declined to defend.

Appellee's policy of insurance, in part, reads as follows (Findings of Fact IX, Tr. 38-39):

EXCLUSION OF PRODUCT LIABILITY

(EXCLUSIONS (A) AND (B) BELOW ARE APPLICABLE WHEN CHECKED.)

☒ (X) (A) BODILY INJURY

It is agreed that the policy does not apply to bodily injury, sickness or disease, including death at any time resulting therefrom:

☒ (X) (B) PROPERTY DAMAGE

It is agreed that the policy does not apply to injury to or destruction of property (including loss of use of such property):

if caused by the handling or use of, or the existence of any condition in goods or products manufactured, sold, handled or distributed by the Insured when the occurrence takes place away from the premises owned, rented or controlled by the Insured, and after the Insured has relinquished possession of such goods or products to others or if caused by operations if the accident occurs after such operations have been completed or abandoned at the place of occurrence (other than pick up and delivery, and the existence of tools, uninstalled equipment, and abandoned or unused material); provided, operations shall not be deemed incomplete because improperly or defectively performed or because further operations may be required pursuant to a service or maintenance agreement.

Subject, otherwise, to all the terms and conditions of the policy.

Attached to and hereby made a part of policy No. 880-7277 of the Northwest Casualty Company, of Seattle, Washington.

Appellant was also insured by a policy of insurance issued by Continental Casualty Company who, through some loan agreement with appellant, did employ counsel and settled the Buffington lawsuit against appellant and others for the sum of \$15,000. Attorney's fees and costs expended amounted to \$1010.73 (Findings of Fact X, Tr. 39-40).

This action was brought to recover the sums paid in settlement, plus costs and attorney's fees.

QUESTIONS PRESENTED

The principal question is whether appellee breached its contract in refusing to defend appellant in the action brought by Buffington. Appellee contends that the obligation to defend does not arise where the gravamen of a complaint against the assured relates to a claim which is clearly outside the policy coverage.

Another question involves the provision in the policy, "liability imposed by law" as it pertains to the payment of \$15,000 by appellant through Continental Casualty Company, in settlement of the Buffington claim.

SUMMARY OF ARGUMENT

The allegations of the Buffington complaint related to a claim for injuries and damages clearly outside the coverage of the policy issued by appellee.

Under a comprehensive liability policy requiring insurer to defend suits brought against the insured, but only as to coverage of the policy, which excludes therefrom injuries or damage caused by handling or use of a product, the insurer is not under a duty to defend or pay amount which insured voluntarily paid to settle claim.

Appellant was not obligated by law to pay Buffington \$15,000, and under the terms of the policy, appellee is not liable to it for such voluntary payment. Liability imposed by law means liability imposed in a definite sum by a final judgment against the insured.

ARGUMENT

POINT I

The Buffington claim was clearly outside the insurance coverage and for that reason there was no duty on the part of appellee to defend.

Appellant contends that the allegations in the Buffington complaint, even though they may refer to a claim partly within and partly without policy coverage, appellee, none the less, had the duty to defend.

The obligation to defend an action against the insured does not arise where it appears from the gravamen of the complaint that the claim is clearly outside the coverage. This conclusion was reached in the recent case of *MacDonald v. United Pacific Insurance Company*, 210 Or. 395, 311 P. 2d 425, where the insured brought an action against the defendant for breach of the provisions of a Personal Comprehensive Liability

Policy. Plaintiff set forth three causes of action all based upon the policy.

In the first he alleged that as a result of an altercation he was charged with assault and battery in the Municipal Court. He pleaded not guilty and called upon the defendant to defend him in that proceeding. Upon defendant's failure to do so, plaintiff was required to and did employ legal counsel for his defense in the Municipal Court action.

By his second cause of action plaintiff set forth the same altercation and alleged that as a result thereof three parties sued him for \$140,000 damages for assault and battery. Again plaintiff demanded that the defendant company defend him but defendant denied that the policy afforded any coverage and refused to assume the defense. Thereafter the plaintiff on advice of counsel settled all of said suits for the amount of \$2,750.00 and they were dismissed with prejudice. Plaintiff seeks that amount from defendant.

As his third cause of action he reiterated his previous allegations and alleged that by reason of defendant's refusal to defend him he was called upon to employ counsel for his defense and incurred costs and attorney's fees in the sum of \$1,590.50, for which sum he seeks judgment from the defendant.

In considering the issues raised, the Court said:

"The plaintiff's claims against the defendant company are of two kinds. By his first and third causes of action plaintiff seeks recovery for legal expenses, costs and attorney's fees incurred by him in defending the criminal and civil actions and rendered

necessary by reason of the alleged wrongful failure of the defendant company to assume the defense of those actions. By the second cause of action plaintiff seeks to recover the amount paid by him by way of a settlement of 'all said suits'. For the purpose of this case only, we shall treat the amount paid in settlement as being a sum which the insured plaintiff became 'obligated to pay by reason of the liability imposed upon him by law . . . for damages . . . because of bodily injury'. Coverage A. Our questions are these: (1) Was the defendant under a duty to assume the defense of the plaintiff, and (2) was it under a duty to pay to plaintiff the amount paid by plaintiff in settlement of the suits? . . .

"The question now arises as to whether the defendant company breached its contract in refusing to defend the plaintiff. The duty to defend is not dependent upon the merit or want thereof in the damage suit brought against the insured. If required to defend it must do so whether the suit be valid or groundless, false or fraudulent. But under the clear wording of the policy the duty to defend applies only 'As respects such insurance as is afforded by the other terms of this schedule under coverages A . . .' Coverage A is limited by the exclusionary clause."

In this case at bar, appellee issued to Sherer, a comprehensive public liability policy which had attached to it the Exclusion of Product Liability. The duty to defend reads: "As respects such insurance as is afforded by the other terms of this policy . . ."

Whether appellee was required to defend appellant against the Buffington claim calls for consideration of the gravamen of her complaint. Both causes of action in her complaint related to personal injuries and property damage caused as a result of an explosion at the

Buffington residence by the handling or use of appellant's contaminated product.

In the first cause of action, it is alleged, that an order for stove oil was placed with appellant on December 1, 1953, and the same was delivered to the residence on December 2nd; that the plaintiff obtained a can and requested the delivery man to place a small quantity of stove oil, as ordered, in the can . . . thereupon said defendants took the hose located upon said truck and poured a petroleum product represented by said defendants to be stove oil, as ordered, in said can; thereupon, plaintiff placed said can and said contents as placed therein by defendant, upon the back porch of her home for later use in starting kitchen stove fires. The next day the plaintiff was required to start a fire in the wood stove, obtained the can which contained only the petroleum product delivered by defendants, and which plaintiff had placed on the back porch, and which had been represented to her as containing stove oil, struck a match and placed the same beneath the wood at the end of the fire box, and commenced to pour a small quantity of the petroleum product from said can upon the wood; that simultaneously, with the first small particle of the petroleum product coming in contact with the wood, the petroleum product from said can ignited and flamed with great force and exploded causing plaintiff serious injuries.

In the second cause of action, as an alternative cause, based upon breach of warranty, she alleged that defendants warranted the product sold was stove oil, but instead it was a dangerous mixture of gasoline.

Both causes of action are based on the undisputed fact that plaintiff had received complete possession of the alleged stove oil in a can provided by her and the same was placed upon the back porch of her home for later use.

Thus, there can be no dispute, the delivery of the product from the truck had been completed and no harm resulted therefrom. The harm to Buffington resulted solely from the *handling* or *use* of an alleged contaminated product the day following its delivery to her. Upon the allegations of her complaint, therefore, no claim was stated within the coverage of the policy of insurance.

In *Remmer v. Glens Falls Indem. Co.*, 140 Cal. App. 2d 84, 295 P. 2d 19, 57 ALR 2d 1379, the court said:

"Appellants also contend that, regardless of whether the policy covered the damage involved, respondent was obligated by the policy to undertake the defense of the appellants in the action brought against them by the Morrisises. The defense clause of the policy has already been quoted. It required the respondent to defend the insured in any action alleging any injury under the policy 'even if such suit is groundless, false or fraudulent'. Under such a clause it is the duty of the insurer to defend the insured when sued in any action where the facts alleged in the complaint support a recovery for an 'occurrence' covered by the policy, regardless of the fact that the insurer has knowledge that the injury is not in fact covered. *Lee v. Aetna Casualty & Surety Co.*, 2 Cir. 178 F. 2d 750; *Employers Mut. Liability Ins. of Wis. v. Hendrix*, 4 Cir. 199 F. 2d 53. But it is equally true that the insurer is not required to defend an action against the insured when the complaint in that

action *shows on its face* that the injury complained of is not only not covered by, but is excluded from, the policy. *Farmers Cooperative Soc. No. 1 v. Maryland Cas. Co.*, Tex. Civ. App., 135 SW 2d 1033. That is the present case.”

In *Journal Publishing Co. v. General Cas. Co.*, 210 F. 2d 202, the Ninth Circuit Court of Appeals said:

“There are also decisions in which the insurer has been held liable to the insured both to satisfy the liability to the third person and to defend the third person’s action. In those cases the allegations of the third person’s complaint disclosed *claims* within the coverage of the policy. But, as we have previously suggested, no court has held that merely because of this state of the pleadings the insurer is obligated not merely to defend but also to pay if recovery is had. In such cases the obligation of payment has been predicated upon the court’s determination that as a matter of fact the liability and the damages claimed by the third person were within the policy’s coverage.” (Citing authorities) (Emphasis supplied).

Appellant cites *Employers Liab. Assur. Corp. v. Youghiogheny and Ohio Coal Co.* (CCA 8), 214 F. 2d 418, on the question of duty to defend. The policy there involved contained a product liability exclusion. The Court pointed out, however, that the claim arose as the result of *a defective car door* and did not result from handling the product of the insured—namely coal. Consequently the product liability exclusion was not involved and the insurance company should have defended. The facts in that case are distinguishable and are not comparable to this case at bar. If the coal car had blown up, as a result of a defective product, the exclusion would have clearly applied.

POINT II

The exclusion endorsement exempts liability for injuries caused by the "handling" or "use" of a product . . . when the occurrence takes place away from the premises of the insured.

In this regard, the Exclusion endorsement of the policy has this language:

"It is agreed that the policy does not apply to bodily injury, sickness or disease . . . : if caused by the handling or use of, or the existence of any condition in goods or products manufactured, sold, handled or distributed by the Insured when the occurrence takes place away from premises owned, rented or controlled by the Insured, and after the Insured has relinquished possession of such goods or products to others . . ."

The above endorsement clearly exempts coverage for bodily injury or damage caused by the handling or use of or the existence of any condition in goods or products manufactured, sold, handled or distributed by the appellant.

Philadelphia Fire & Marine Ins. Co. v. City of Grandview, 42 Wash. 2d 357, 255 P. 2d 540, gave consideration to a policy of insurance with identical language as appears in this policy at bar. Appellant cites that case in its brief and fairly outlines the salient facts. That case supports appellee. In finding that the products liability exclusion was not applicable to the facts, since the City of Grandview was not manufacturing or selling gas, the Court said:

" . . . The negligence of the city in permitting a dangerous concentration of gas to be introduced into the house is the basis of the judgment against

the city. It is true that the gas was negligently introduced into the house by the same vehicle that delivered water to the house; but it does not necessarily follow that it thus attained the same status. *This is not a case involving the sale of a contaminated product.* It is this fact which distinguishes it from the authorities cited . . . wherein dynamite caps had been mixed with coal. . . ." (Emphasis added).

Appellant cites *A. R. Heyward, II, and C. D. Tucker, doing business as W. B. Guimarin & Co. v. American Casualty Company of Reading*, 129 F. Supp. 4. That case is clearly distinguishable. It involved a situation where the insured had a subcontract on a housing project for the plumbing and heating portion thereof, and which involved the construction of underground gas lines. Before the housing project was fully completed, a portion of it was occupied, when an explosion occurred in one of the apartments, causing personal injuries to a person, who thereafter brought action against the insured. The court found that the allegations of the complaint for injuries were clearly based upon a negligent construction, and not upon a claim relating to a defective product.

In this case at bar it should be noted, that the Exclusion endorsement reads:

" . . . when the occurrence takes place away from the premises owned, rented, or controlled by the Insured, . . ."

The above language has been considered in the following cases:

Loveman, Joseph & Loeb v. New Amsterdam
Cas. Co., 233 Ala. 518, 173 So. 7.

Standard Acc. Ins. Co. v. Aberts (CCA 8), 132 F. 2d 794.

Farmers Co-op. Soc. v. Maryland Cas. Co., 135 SW 2d 1033.

Carter v. Nehi Beverage Co., 329 Ill. App. 329, 68 NE 2d 622.

Lyman Lumber & Coal Co. v. Travelers Ins. Co., 206 Minn. 494.

In *Loveman, Joseph & Loeb v. New Amsterdam Cas. Co.* supra, the policy involved provided that it did not cover any accident "caused directly or indirectly by the possession, consumption, handling or use, elsewhere than upon the premises described."

The party injured discussed the merits of a sun tan lotion with the plaintiff's clerk, after which the clerk delivered a preparation which was not to be used in the sun. This precaution was not observed by the injured party. The Court held that under the very clear and unambiguous terms of the policy it did not cover accidents "caused directly or indirectly by the possession, consumption, handling or use, elsewhere than upon the premises described in the schedule of statements, of any goods, article or product, manufactured, handled or distributed by the assured." The court further stated that since the accident was not caused by the possession, consumption, handling or use of the preparation given to the injured party upon the plaintiff's premises, there was, under the limitation clause of the policy, no liability upon the insurer.

In *Standard Acc. Ins. Co. v. Roberts*, supra, it appeared that the business of one of the defendants was the sale and installation of furniture and fixtures, and that

he sold a certain person a gas-operated refrigerator and installed it in the purchaser's residence, the installation being completed by coupling up the refrigerator to the gas pipes in the house; during the following night, the householder, his wife, and children were injured by gas escaping from such refrigerator connections.

After stating that it did not need to determine whether installations in residences was within the coverage, the court went on to say that even if it should be, the provision of the "Products of Completed Operations" clause, quoted above, clearly excluded the occurrence in question from coverage because it happened away from the insured's "premises;" it resulted from the existence of a "condition in premises or property caused by operations of the insured;" the accident occurred "after the completion . . . of such operations at the place of occurrence thereof and away from premises owned, rented or controlled by the insured;" and it was not caused by "tools, uninstalled equipment and abandoned or unused material."

An endorsement to the policy excluded liability for an accident occurring after the insured had relinquished possession thereof to others and away from the premises owned, rented and controlled by him, and also excluded the existence of any condition in premises or property away from those of the insured.

In *Farmers Co-op Soc. v. Maryland Cas. Co.*, supra, it appeared that the plaintiff operated a gasoline station in connection with a cotton gin, and that the person injured was a customer of the plaintiff and purchased

what he thought was a 5-gallon can of kerosene, but the container being filled by mistake with gasoline or a mixture of gasoline and kerosene, the liquid delivered was much more inflammable and explosive than kerosene, and while the customer's wife was filling a lamp with the liquid, an explosion occurred, causing her clothes to catch fire. While the husband was attempting to extinguish the flames, he inhaled flames, gases, and vapors, which irritated his throat and lungs so that pneumonia developed, resulting in his death. The court rejected the contention of the plaintiff that the "use" of the liquid purchased by the deceased began upon the premises of the plaintiff, on the ground that the policy plainly provided that it did not cover accidents caused by the use of goods handled by the plaintiff elsewhere than upon its premises.

In *Carter v. Nehi Beverage Co.*, supra, one who had recovered a default judgment in an action for personal injuries caused by an exploding bottle of pop, sought to garnish the tortfeasor's public liability insurer, which denied any indebtedness to the insured as a result of the litigation in question. The complaint against the bottling company alleged that it conducted its business in Elgin and that the bottle exploded at the wayside stand of plaintiff's aunt in Wauconda. In affirming the judgment below discharging the garnishee, the court expressed doubt that the accident in question came within the insuring clauses of the policy; then observed that, assuming it did, "we are confronted by the exclusion clause which follows;" and quoted the language referred to: "This policy shall not cover loss

from liability for . . . injuries or death: . . . (4) Caused by . . . the consumption of any article or product manufactured, handled or distributed by the Assured *elsewhere than upon the Assured's premises.*"

In *Lyman Lumber & Coal Co. v. Travelers Ins. Co.*, 206 Minn. 494, 289 Ia. 40, the facts indicated that William Hullsiek ordered from Lyman Lumber & Coal Company a ton of coal which was delivered and unloaded in Hullsiek's coal shed a few days before the accident and injuries to a minor as the result of fuse caps containing dynamite delivered in the coal. The lumber company held public liability policies issued by the defendant insurance company, which policies excluded (c)

"the possession, consumption, or use elsewhere than upon the Insured Premises of any article manufactured, handled, or distributed by the Assured unless covered hereunder by written permit endorsed on this Policy."

Hullsiek brought an action against the lumber company and alleged acts of negligence in carelessly delivering coal containing dynamite caps and failing to remove said caps or warn Hullsiek, such negligent acts being done when the assured knew or should have known that the caps were attractive to children, and that by reason of said explosion caused by its negligence the minor was injured.

The lumber company tendered the defense of the actions to the defendant insurance carrier claiming to be protected by the policies. The defendant took the position that the policies of insurance did not afford

coverage and declined to defend. The lumber company successfully defended the Hullsiek case and brought action against the insurance carrier to recover the costs expended.

The court found that the possession and use elsewhere of the coal than on the insured premises was within the exclusion provisions of the policy and that the insurer was not obligated to defend the action. It would only be bound to defend the assured against *claims* as would, if proved, *create liability* against which the insurer would be bound to indemnify the assured.

In this case at bar, the Exclusion of Products Liability endorsement has this language:

“. . . or if caused by operations if the accident occurs after such operations have been completed or abandoned at the place of occurrence . . .”

If delivery of the stove oil purchased is regarded as an operation, such operation was concluded on December 2, 1953 when it was placed on the porch in the Buffington can, and the policy exempted coverage for the accident occurring the next day.

In *U. S. Sanitary Specialties Corp. v. Globe Indemnity Co.*, 204 F. 2d 774 (CCA 7), the court said:

“To determine just what coverage was thus excluded from this policy we must consider the definition of the hazard, ‘Products (Including Completed Operations),’ which we find defined in the policy under the title, ‘Definitions,’ as follows:

“(c) Products Hazard. The term “products hazard” means

“(1) the handling or use of, the existence of any condition in . . . goods or products manu-

factured, sold, handled or distributed by the named insured, . . . if the accident occurs after the insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the insured . . . ;

“(2) operations, if the accident occurs after such operations have been completed or abandoned at the place of occurrence thereof and away from premises owned, rented or controlled by the insured, except . . . (b) the existence of tools, uninstalled equipment and abandoned or unused materials . . . provided, operations shall not be deemed incomplete because improperly or defectively performed . . . ’”

* * *

“It also seems clear that in this case the ‘operation’ of the plaintiff here involved—the demonstration of its wax product by the county officials to induce a purchase of the product by the county officials—had been completed when the personal injury plaintiff slipped and fell. The small area on the floor was waxed on December 1, 1951. On December 10, 1951, as a result of the demonstration, the county officials made a purchase of the wax product, and on the following day, December 11th, the accident occurred.

“The selling of this type of wax product was a regular part of plaintiff’s business. A demonstration of the product to induce purchases was a regular operation in the course of plaintiff’s business. This particular demonstration was, at the time of the accident, a ‘completed or abandoned’ operation within the meaning of the policy definition of ‘operation’ given in Paragraph (2) under ‘Products Hazard.’ ”

POINT III

Appellant was not obligated to pay Buffington for there was no liability imposed upon it by law.

Appellant is bound by the terms of the policy. The "Insuring Agreements" of the policy has this provision:

Bodily Injury
and Property
Damage
Liability.

- (1) To pay on behalf of the Insured, all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law. . . .

Appellant was not obligated by law to pay Buffington the sum of \$15,000, accordingly appellee is not liable to it for the amount of such payment.

In *Girard v. Commercial Standard Ins. Co.*, 66 Cal. App. 2d 483, 152 P. 2d 509, the court held that the term "liability imposed by law" as used in an automobile liability policy is ordinarily construed to mean liability imposed in a definite sum by a final judgment.

The Court stated:

"Under the rules enunciated in the authorities cited, we cannot escape the conclusion that the policy before us 'was simply an undertaking to pay any final judgment which the injured person might obtain against the assured, and that the obtaining of such final judgment constituted a condition precedent to any action which the injured person might have against the insurance carrier.' "

To the same effect is found in *Philadelphia Fire & Marine Ins. Co. v. City of Grandview*, supra, where the Court said:

"In order to establish its right to recover under the insurance policy, respondent must prove: (a)

that a liability has been imposed upon the city by law; (b) that the facts upon which liability was based established a situation within the terms of the policy; and (c) the amount of the judgment."

CONCLUSION

The allegations in the Buffington complaint clearly showed that her claim arose out of the handling and use at her residence of a contaminated product. This claim was outside the coverage of the policy of insurance and appellee did not have the duty to defend the action or pay the amount of the settlement made by appellant.

Appellant has not complied with Rule 18(2)(d) of the Rules of this court requiring it to set forth in its brief a specification of errors relied upon and particularly each error intended to be urged. For this reason it has been difficult for appellee to determine precisely the error relied upon by appellant in this appeal.

The judgment should be affirmed.

Respectfully submitted,

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NO. 16072

**United States
COURT OF APPEALS**

for the Ninth Circuit

TIDEWATER ASSOCIATED OIL COMPANY,
a Corporation,

Appellant,

vs.

NORTHWEST CASUALTY COMPANY,
a Corporation,

Appellee.

APPELLANT'S REPLY BRIEF

*Appeal from the United States District Court
for the District of Oregon.*

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for the District of Oregon.*

SUMMARY OF ARGUMENT

I. Even though a complaint against the insured asserts a cause of action upon various grounds which are not within the coverage of the policy, the duty to defend arises from any allegations setting forth the cause of action which might be within the coverage.

II. The endorsement entitled "Exclusion of Product Liability" is confined to goods or products manufactured, sold, handled or distributed by an insured.

III. The term, "liability imposed by law" does not prevent the insured from recovery under the policy if insured settles and compromises a claim after the insurer wrongfully refuses to accept coverage under terms of policy.

ARGUMENT

I. Even though a complaint against the insured asserts a cause of action upon various grounds which are not within the coverage of the policy, the duty to defend arises from any allegations setting forth the cause of action which might be within the coverage.

Appellee first argues that the obligation to defend an action against the insured does not arise where it appears from the gravamen of the complaint that the claim is *clearly* outside the coverage. (Appellee's Brief, P 5). This is a conclusion which is not supported by the allegations of the Buffington Complaint, for it could well have been determined by a court or jury that the proximate cause of the accident and injury to the complainant was the use of faulty equipment by the insured, but for which no accident would have occurred.

Appellee, in support of its contention, cites the case of *MacDonald v. United Pacific Insurance Company*, 210

Or. 395, 311 P2d 425, (Appellee's Brief, P 5), which case was not purposely omitted but inadvertantly not listed in Appellant's Brief. This case in no way contradicts appellant's argument. But in fact supports appellants contention. The actions brought against MacDonald were for assault and battery, which as the court stated was by its very essence an allegation that MacDonald was guilty of an *intentional* attempt by force and violence to do an injury to the person of another, coupled with the present ability to carry the intention into effect, and consummated by hostile, unpermitted physical contact with the person. (P 399). The policies specifically excluded "injury * * * caused *intentionally* by * * * the insured."

Appellee, as a final point, cites a case which appellant referred to, which is the case of *Employers Liability Assurance Corp., Ltd., v. Youghioghney & Ohio Coal Co.*, (CCA 8) 214 F2d 418. Appellee, in commenting on this case, becomes trapped in its own language, in that it fails to distinguish between defective or faulty equipment and a defective product. The court in the *MacDonald case*, supra, considered the companion case, *Youghioghney & Ohio Coal Co. v. Employers' Liability Assurance Corp.*, Minn. 1953, 114 F. Supp. 472, and stated on Page 406 as follows:

"If in the pending case the injured parties had sued the plaintiff by a complaint asserting both negligent injury and assault and battery, a different problem would have been presented and it might have

been the duty of the insurer to defend at least until it was established that the injury was intentional. The decision in the Youghioghenny case was based on the finding that a part at least of Burnett's Complaint did allege facts which fell within the coverage of the policy. The coal company was therefore entitled to recover both the amount paid by it in settlement and the expense incurred in defending Burnett's suit."

In the case at hand, therefore, we are not called upon, as appellee claims at Page 7 of Appellee's Brief, "for consideration of the gravamen of her complaint," but rather to consider the specific charges found in the Buffington Complaint, and appellant contends that use of faulty equipment states a cause of action within the general insuring clauses of the insurance contract and not excluded under the products exclusion endorsement.

II. The endorsement entitled "Exclusion of Product Liability" is confined to goods or products manufactured, sold, handled or distributed by an insured.

Appellee first contends that the case of *Philadelphia Fire & Marine Insurance Co. v. City of Grandview*, 42 Wash. 2d 357, 255 P2d 540, and the case of *A. R. Heyward II and C. D. Tucker, doing business as W. B. Guimarin & Company v. American Casualty Company* of Reading, Pennsylvania, 129 F. Supp 4, (Appellee's Brief, Pp 11, 12) are cases which, although cited by appellant, support appellee. The appellee again fails to distinguish between defective or contaminated products manufactured, sold, handled or distributed by an insured which give rise to an accident causing injuries to a third person and acci-

dents causing injuries which stem from the use of faulty equipment. The proximate cause of the injuries in the two above-cited cases were thus distinguished by the courts and certainly support appellant's contentions. In the *City of Grandview case*, supra, the city was not manufacturing or selling gas, and the court held that the proximate cause was the negligence of the city in permitting the gas to be introduced into the injured party's home and that this was not in any way a product manufactured, sold, handled or distributed by the insured, and in the *Heyward case*, supra, the court held that the allegations of the complaint and the proximate cause of the injury was the negligent construction of the plumbing and heating portions of a housing project and that there was no claim that the products installed were defective products in any way.

Appellee, in support of its argument, cites the following cases:

Loveman, Joseph & Loeb v. New Amsterdam Cas. Co., 233 Ala. 518, 173 So. 7.

Standard Acc. Ins. Co. v. Aberts (CCA 8), 132 F. 2d 794.

Farmers Co-op. Soc. v. Maryland Cas. Co., 135 SW 2d 1033.

Carter v. Nehi Beverage Co., 329 Ill. App. 329, 68 NE 2d 622.

Lyman Lumber & Coal Co. v. Travelers Ins. Co., 206 Minn. 494.

Appellant has read each of the above-cited cases, and not one of them has any act of negligence alleged, contending that the proximate cause of any accident and

injury is the result of the use of faulty equipment by the insured. The cases, therefore, are not in point. Appellee again fails to consider the point of appellant as upheld by the cases cited by appellant to the effect that faulty equipment is not "goods or products manufactured, sold, handled or distributed by the insured."

Appellee further contends that if the purchase by Buffington is regarded as operations, the operation was concluded on the date of delivery and an accident occurring the following day was exempted from coverage under this policy. (Appellee's Brief P. 17). Should this court consider this argument, we refer to the case of *Reed Roller Bit Co. v. Pacific Employers Ins. Co.*, 5 Cir., 198 F. 2d 1.

The plaintiff, Reed Roller Bit Company, appealed from a judgment in favor of the defendant to dismiss the complaint for failure to state a claim upon which relief could be granted to plaintiff. It involved an action upon a liability insurance policy to cover expenses, attorneys fees and money paid by plaintiff in settlement of an action brought against it for negligence in representing that a certain abrasive wheel of another company, when used upon Reed's grinding machine, was not dangerous, whereas as a matter of fact, it was dangerous and not safe to use on Reed's machine, and an injury occurred as a result of said use. One of the grounds of negligence charged was the representation by the employee that the article was safe for use and was being used at the time of the accident wherein it was not safe for the purpose intended. The plaintiff contended that by reason of this allegation of negligence,

the company became bound and obligated under the terms of the policy to pay any damages recovered or paid in good-faith settlement within the policy limits.

The policy contained within it a products clause almost identical to that of the case in hand. It further contained a premises-operations coverage clause covering operations which were necessary to the ownership, maintenance or use of the premises. The District Court concluded that the negligence charged against Reed was with respect to one of its products, and the Appellate Court held this to be error in that the negligence charged against Reed was with respect to the acts and representations of Reed's agent and salesman. The court stated as follows:

“* * * Considering the alleged representations of Reed's Agent to be ‘operations’ were they operations which had been completed before the accident occurred such as would come within the coverage under ‘Products’ and be excluded from the coverage under ‘Premises-Operations’? To answer in the affirmative would result in relieving the Insurance Company from any liability for negligence representations of the agents or salesmen of the insured because, of course, no person could be injured as a result of acting upon a negligence representation until after the representation had been made to him.

“We hold that an operation consisting of a negligent representation made for the purpose of or reasonably calculated to induce action *is not completed until the person to whom the representation is made acts in reliance upon that representation.*

“The result follows that the plaintiff's complaint states a claim upon which relief can be granted, and that the judgment of the District Court dismissing

said complaint is reversed and the cause remanded for trial.”—(Italics ours).

The *Reed Roller Bit case*, supra, was decided in Texas by the United States Court of Appeals twelve years after the Texas case of *Farmers Co-op. Soc. v. Maryland Cas. Co.*, 135 SW 2d 1033, supra, cited by appellee, and does not even make reference thereto.

Also, in the case of *Ocean Accident & Guaranty Corporation, Ltd., v. Aconomy Erectors, Inc., and Roy J. Green, Administrator of the Estate of John A. Green, deceased*, (United States Court of Appeals, 7th Cir., June 21, 1955) 224 F. 2d, 242, the question was raised as to whether or not the work of an Insured upon a building had been completed at the time of a fatal accident so as to deny coverage under the policy by reason of a provision in the policy as to completion of operations under provisions similar to those in other cases cited herein and the action at hand. The allegation of the plaintiff in the action brought against the Insured was that the injury to the deceased was caused by “Imperfect and Negligent Construction of the Welding and Placing of the said steel beams by” (Defendant-Insured). The court, after determining that a real factual issue had been raised as to the material facts in the case sufficient that the court could not grant a summary judgment as had been done in the lower court, stated as follows:

“2. A careful reading of the policy raises another question which might be controlling in this case. The true meaning of the policy is difficult to determine. An examination of it involves a physical effort of no

mean proportions. Starting out with three printed pages, the first of which consists largely of a form which is filled in on a typewriter, the reader is confronted also with six physically attached supplements, or riders, inconveniently assorted into different sizes. If he is possessed of reasonable physical dexterity, coupled with average mental capacity, he may then attempt to integrate and harmonize the dubious meanings to be found in this not inconsiderable package. A confused attempt to set forth an insuring agreement is later assailed by such a bewildering array of exclusions, definitions and conditions, that the result is confounding almost to the point of unintelligibility. To describe the policy as ambiguous is a substantial understatement. To ascertain its meaning we are forced to seek refuge in the well settled rules that insurance contracts are to be construed liberally in insured's favor and strictly against the insured. (Citing Cases) and conditions and stipulations in the policy are to be construed most strictly against the insurance company (Citing Cases).

"Guided by these rules, it might reasonably be claimed that there emerges through the confusing language and the shapeless masses of words before us, an intention to protect Aconomy from the commonplace risks incidental to the business of a construction contractor. Was that the protection for which Aconomy paid a premium? If it could be deduced that the meaning of the policy is that the building under construction, to the extent that it was controlled by Aconomy in doing its work under contract with Svejcar, was the premises covered by the policy, and the work done there by Aconomy constituted the operations, the hazards of which were insured, it might be seriously contended that Aconomy was and is entitled to the protection of the policy insofar as the Green Accident is concerned.

"It might be in good faith argued that there were no 'products' insured by this policy, because the word,

‘Products’ was intended to refer to articles made by an insured and offered for sale, and further, that there is therefore no occasion to consider the argument of plaintiff in regard to the definition of ‘products hazard’ contained in the policy and, for the same reason, the question of whether the operation of Aconomy had been completed at the time of Green’s accident, is immaterial.”

Appellant contends that the Reed Roller Bit case and Ocean Accident case are cases wherein the acts of negligence did not relate to products or a condition in goods or products manufactured, sold, handled or distributed by the insured.

By analogy, it cannot be said that appellant manufactured, sold, handled or distributed, within the language of the products exclusion rider, *faulty equipment*.

III. The term, “liability imposed by law” does not prevent the insured from recovery under the policy if insured settles and compromises a claim after the insurer wrongfully refuses to accept coverage under terms of policy.

Appellee claims that the provision in the policy that insurer would only pay such sums for and on behalf of insured that insurer would become obligated to pay by the liability imposed upon him by law, prevents recovery by the appellant herein for the reason that appellant was not obligated by law to pay Buffington the sum of \$15,000.00, and further, that liability imposed by law means the “amount of final judgment.” (Appellee’s Brief, P. 19). This is not the law.

In support of this contention, Appellee cites: *The Philadelphia Fire & Marine Insurance Co. v. City of Grandview case*, and *Girard v. Commercial Standard Ins. Co.* (Appellees Brief, P 19). Appellant does not take issue with either of these cases, but does state that the said cases are not at all in point with the case at hand.

It is the contention of the Appellant that where a complaint alleges facts which represent a risk outside of the coverage of the policy, but also avers facts as in the Buffington complaint, which if proved, represent a covered risk, the insurer is under a duty to defend and in failing to contend the insurer is responsible to reimburse the insurer for the amount of any reasonable settlement, together with the insured's expenses relative thereto.

It is a well-settled rule of law that where an insurance company denies liability and refuses to defend an action, the insurer has the right, provided he acts in good faith and with due care and prudence, to enter into a compromise and settlement, and thereafter proceed against the insurer for amounts expended in the defense of the suit as well as the amount for which the cause was settled and compromised. The courts generally hold that an insurer may avail itself of a "reservation of rights" and proceed to defend the suit until such time as it may deem that it has no liability. To refuse to defend when there is liability is a breach of contract, and the insured may proceed to settle and compromise the action even though the policy provides otherwise.

8 Appleman Ins. L. & P., Paragraph 4690, Page 13 and Paragraph 4694, Page 62.

Youghiogeny & Ohio Coal Co. vs. Employers' Liability Assur. Corp., Ltd, 114 F. Supp 472.

Continental Casualty Co. v. Shankel, CCA 8, Okl. 1937, 88 F2d 819.

Hardware Mutual Casualty Co. v. Hilderbrandt, C. A. Okl. 1941, 119 F2d 291.

Basta v. United States Fidelity & Guaranty Co., 107 Conn. 446, 140 A 816.

The Court below, in the instant case, has already determined that the settlement was a fair and reasonable one and that the costs and attorneys' fees expended in the defense and settlement of the Buffington case were fair and reasonable.

CONCLUSION

The allegations of negligence set forth in the Buffington Complaint were such as were covered under the general insuring agreements of the Comprehensive Public Liability Policy written by appellee and upon which appellant appeared as a named insured. The decision of the court below should be reversed and the appellant awarded judgment for the amounts as prayed for in its Complaint, as well as reasonable attorneys' fees to be therein determined.

Rule 18 (2) (d) of the rules of this court are to the effect that when findings are specified as error, the specifications shall state *as particularly as may be* wherein the findings of fact and conclusions of law are alleged to be erroneous. An examination of the transcript of record on appeal will

reveal that the sole question in controversy has been the contention by appellant and the denial by appellee that the acts of negligence set forth in the Buffington Complaint were within the general insuring agreements of the policy and not affected by the products exclusion endorsement. The decision of the lower court, as set forth in its opinion, (R., p 36) determined this question adverse to appellant. Appellant appealed from the findings of fact and conclusions of law based upon this opinion and the judgment entered therein, as set forth in appellant's "STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL," (R., pp 42, 43), "STATEMENT OF THE CASE," (R., pp 2, 3, 4), and "STATEMENT OF POINTS TO BE URGED" (Appellant Brief, P 4). All other matters were resolved. Appellant feels it has substantially complied with the rule as set forth and cannot ascertain wherein appellee has been unduly burdened.

Respectfully submitted,

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